90-900

No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 10, 1990

QUESTIONS PRESENTED

1. Whether *Employment Division v. Smith*, 110 S.Ct. 1595 (1990), may be extended to uphold a landmarks preservation law against a First Amendment challenge where:

   (a) the law is applied selectively and has a disproportionate impact on religious organizations;

   (b) the law provides a system of individualized exemptions that excludes consideration of religious hardship; and

   (c) application of the law gives rise to a "hybrid" case that also involves the constitutional protection provided by the takings clause of the Fifth Amendment?

2. Whether the court of appeals applied an erroneous constitutional standard in holding that, although the application of a landmarks preservation law to petitioner "drastically restricted" petitioner's ability to generate revenue to support its religious mission, no infringement of petitioner's First Amendment rights could be found absent proof that petitioner "cannot continue its religious practice in its existing facilities?"

3. Whether the court of appeals erred in requiring petitioner to show, in order to establish a taking under the Fifth Amendment, that it "cannot continue its existing charitable and religious activities in its current facilities," even though application of the landmarks preservation law had destroyed more than eighty percent of the total value of petitioner's property?

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No. 90_____

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

v.

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, in *St. Bartholomew's Church v. City of New York*, 2d Cir. No. 90–7101 (Sept. 12, 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 914 F.2d 348 (2d Cir. 1990). The district court opinion is reported at 728 F. Supp. 958 (S.D.N.Y. 1989).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under the First, Fifth and Fourteenth Amendments to the Constitution and 42 U.S.C. § 1983 and involves the Landmarks Law of New York City, New York City Administrative Code §§ 25–301 to 25–321 (1996)("Landmarks Law"). (61a – 99a).

STATEMENT OF THE CASE

This case concerns the burdens imposed by the Landmarks Law on churches and other religious organizations generally and, in particular, upon petitioner, The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or the "Church").

In this case, the application of the Landmarks Law has prevented petitioner from developing a portion of its property to support its religious mission. Specifically, petitioner seeks to

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1. The opinion of the court of appeals is reprinted at pages 1a – 24a of the appendix to this brief. The district court opinion is reprinted at pages 25a – 57a of the appendix to this brief. The appendix in the court of appeals is cited as "(A. ___)." The appendix in the district court is cited by volume/page; for example, 10/3271 refers to volume 10, page 3271 of the district court appendix.

demolish the community house adjacent to its church building and erect a new building. The lower floors of the new building would provide space for various church activities. The upper floors would generate income that petitioner believes is essential to support its mission, to repair and rehabilitate the church building and, indeed, to assure its survival. The application of the Landmarks Law has destroyed ninety percent of the value of the community house site and eighty percent of the value of the entire property and has deprived the Church of the ability to use any of that value in support of its mission. In addition, the Church has been left with a facility that provides insufficient space and is in need of major repair and rehabilitation.

1. The Landmarks Law and Religious Organizations.

The Landmarks Law permits the designation as a landmark of any 30 year old building determined by the Landmarks Preservation Commission ("the Commission") to have "a special character." Landmarks Law § 25–302 n., (66a).[2]

As of 1986, approximately 600 buildings in New York City had been individually landmarked, and of that number 95 were churches or other religious buildings. (A. 188). Each of the churches whose property has been landmarked must, under criminal penalty, maintain the landmarked appearance of that property and cannot make *any* alteration or modification to the exterior without the permission of the Commission. Landmarks Law §§ 25–305, 25–317, (74a – 76a, 95a – 96a).

If a church seeks to alter its property it must first apply for a "certificate of appropriateness" that will be granted or denied by the Commission on the basis of its aesthetic judgment. Landmarks Law §§ 25–307 a., 25–307 d., (77a, 79a). If a certificate of appropriateness is denied, the church

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2. The Landmarks Law also authorizes the designation of historic districts but such designations are not at issue in this action.

may then apply to the Commission for a "certificate of appropriateness on the ground of insufficient return."[3]

2. The Landmarks Law and St. Bartholomew's.

St. Bartholomew's was organized as a Protestant Episcopal Church in 1835. The Church constructed buildings on its current site, at the corner of Park Avenue and 50th Street, in 1918. The buildings originally consisted of the church building and a small parish house. In 1927, the parish house was demolished and the present community house was constructed. (10/3271-73).

On March 16, 1967, the Commission issued a report designating the church building and the community house a landmark. (A. 596–97). Although the designation report of the Commission detailed the many beautiful architectural features of the church that formed the basis for designation, it did not ascribe any distinctive architectural features to the community house.

In December, 1983, the Church applied for a certificate of appropriateness to construct a 59 story building on the site of the community house. By letter dated June 21, 1984, the Commission criticized the design of the proposed building and denied the Church's application. (A. 598–603).

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3. To obtain such certificate, a church (or other tax exempt owner) must establish, *inter alia*, that the property, if it were not tax exempt, would be incapable of earning a reasonable return and that the property is no longer "adequate, suitable or appropriate" for its charitable purposes. Landmarks Law §§ 25–309 a.(1)(a), (80a). In addition to the statutory test, the New York Courts have developed as a "judicial test" an alternative standard for relief applicable to charitable institutions including churches: *i.e.*, that a landmark designation is permitted "only so long as it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose." *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980).

In December, 1984, the Church made a second application for a certificate of appropriateness. It was based upon a complete redesign of the proposed building to meet the aesthetic objections of the Commission to the first building.[4] Nevertheless, the Commission rejected the redesigned building. (A. 604–07).

In September, 1985, the Church applied for relief on the ground of "insufficient return." The Church presented evidence that the space in the community house is inadequate to accommodate the current needs of the Church's programs, and that both the church building and the community house suffer from serious physical deterioration. (*E.g.*, A. 506–29, 635–72). An expert witness for the Church estimated that the cost of the essential repair and rehabilitation work needed to permit both buildings to function safely and adequately would exceed $11 million. (A. 644–47).

The Church also established that the major portion of the value of its property lay in its development value. When the Landmarks Law destroyed that value, it reduced the total value of the Church's property by more than eighty percent. Specifically, a report and testimony of an appraisal firm placed the value of the entire landmark site, if not landmarked, at $175,000,000, and as landmarked at $35,000,000. The value of the community house site alone, if not landmarked, was found to be $125,000,000, and as landmarked, $15,000,000. (A. 608–09).

On February 24–25, 1986, the Commission passed resolutions denying the Church's application. The resolutions were based, in principal part, upon estimates of repair and

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4. The redesigned building reflected a twenty percent reduction in space available for the community house and a fifty-two per cent reduction in the space to be leased as commercial offices. (A. 482–83). In addition, the materials and texture of the proposed building had been changed from reflective glass to limestone and brick in order to harmonize with the church building. (A. 456–78, 1118).

rehabilitation introduced at Executive Sessions of the Commission to which the Church had requested — and been denied — an opportunity to respond. (A. 407–48, 764–69). Such estimates totaled approximately $3 million.

This action was commenced in April, 1986. The complaint challenged the constitutionality of the Landmarks Law as applied to St. Bartholomew's and the facial validity of the law as applied to religious organizations generally. Federal claims were asserted under the First, Fifth and Fourteenth Amendments and 42 U.S.C. § 1983.

The district court upheld the facial validity of the Landmarks Law as applied to religious organizations generally. The court also rejected the Church's claims that the application of that law to St. Bartholomew's had violated its rights under the First and Fifth Amendments as incorporated by the Fourteenth Amendment. The latter claims were denied on the grounds that the Church had failed to prove that "it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities." (57a).

The court of appeals affirmed. Without considering the impact of the law on religious organizations generally, it approved the standard applied by the district court with respect to St. Bartholomew's and the finding that the Church had failed to meet that standard.

REASONS FOR GRANTING THE WRIT

> " [The court of appeals decision] is a total affirmation, really, of our powers," said Laurie Beckelman, chairwoman of the city's Landmarks Preservation Commission. She said the court was affirming "the absolute power" of the commission "to designate and regulate religious properties as landmarks." *The New York Times*, Sec. B, p. 4, col. 2, September 13, 1990.

* * *

The power of landmark preservation commissions to appropriate religious property has become a painful reality to religious organizations throughout the country. As neighborhoods change, congregations, once–thriving but now diminished, are often left with buildings that are ill–suited to their needs and costly to maintain and repair. When those buildings have been landmarked, the capacity of a church to plot a course for survival is seriously threatened. If the church seeks to modify such a building — to serve the changing needs of its congregation — it will quickly discover that its destiny rests in the hands of a secular agency whose priorities are altogether different and whose discretion is virtually unfettered.

Against this background, the present case raises issues of broad significance in two areas of constitutional jurisprudence: the free exercise clause of the First Amendment and the takings clause of the Fifth Amendment. Although the free exercise clause and the takings clause implicate quite different values, the court of appeals rejected petitioner's claims under each clause by application of the same simplistic formula — that no constitutional violation has occurred so long as petitioner has not been prevented from carrying on its existing activities in its current facilities. That standard has no basis in the precedents of this Court and conflicts with decisions of the highest courts of the states of Washington and New York.

Free Exercise. In rejecting petitioner's free exercise claims, the court of appeals ignored the effect of the Landmarks Law on religious organizations generally and looked only to the impact on petitioner. The court then proceeded to create a standard that denies petitioner the ability to adapt its property to a use compelled by the religious convictions of its congregation. The decision of the court of appeals and the standard it applied were clearly in conflict with the recent decision of the Supreme Court of Washington in *First Covenant Church v. City of Seattle*, 114 Wash.2d 392, 787 P.2d 1352 (1990) which had

found the landmarking of a church to be a violation of the free exercise clause.[5]

The decision by the court of appeals herein did not discuss, or even cite, *First Covenant*. Rather, the court relied principally on this Court's decision in *Employment Division v. Smith*, ___ U.S. ___, 110 S.Ct. 1595 (1990), which held that requiring compliance with a neutral and generally applicable criminal law did not infringe the free exercise clause. The most basic error of the court of appeals was to conclude that the Landmarks Law is a "generally applicable" law within the meaning of *Smith*. Moreover, the court failed to consider the two major exceptions to the applicability of *Smith* that were explicitly recognized in that case: (a) cases arising under laws that provide systems of individualized exemptions but exclude (as the Landmarks Law does) consideration of religious hardship; and (b) "hybrid" cases wherein a free exercise claim is joined with a claim of other constitutional rights, in this case petitioner's rights as a property owner under the Fifth Amendment.[6] In short, the decision below represents a broad and unwarranted expansion of *Smith* that this Court should correct.

Takings. Petitioner's takings claim presents an important question not previously addressed by this Court: the standard to be applied in determining whether a regulation that affects the property of a charitable or religious institution constitutes a taking. We submit that, while the takings analysis may differ in some particulars, a charitable or religious property

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5. The landmarking of a church was also invalidated on First Amendment grounds in *Society of Jesus of New England et al. v. Boston Landmarks*, Suffolk Co. of Mass., appeal docketed No. 5415 (Sup. Jud. Ct. Mass. June 22, 1990).

6. Subsequent to *Smith*, a motion for reconsideration was filed in *First Covenant* and was denied by the Supreme Court of Washington on September 12, 1990.

owner is surely entitled to no less protection under the Fifth Amendment than a commercial owner. Such protection, however, was plainly denied under the standard applied by the court of appeals.

In denying petitioner's claim under the takings clause, the court of appeals applied a redacted, and seriously distorted, version of the constitutional test adopted by the New York Court of Appeals for assessing the validity of the Landmarks Law as applied to charitable institutions. *See Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.Ed.2d 922 (1980). In support of the standard it created, the court of appeals cited only one decision of this Court, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) — which was decided twelve years ago by a divided court. Although the decision was heavily fact-dependent — and the facts were, in important respects, quite untypical — it has been frequently misunderstood as a broad charter for any and all landmarking.[7] Thus, in the present case, the courts below viewed *Penn Central* as dispositive, with little heed to the striking dissimilarity of its facts. The result was a decision that is, in principle, contrary to *Penn Central* or, at best, a major and unwarranted extension of that case. Such a result is particularly troublesome in light of subsequent decisions of this Court that suggest a limitation — and not an expansion — of the reach of *Penn Central*.

A decision that permits landmarking to destroy, without compensation, more than eighty percent of the value of a property will have a major impact. Indeed, if the decision is permitted to stand, it will be seen as a clear signal that few if any constraints to landmarking are posed by the takings clause. The decision of the court of appeals, therefore, will have serious implications, not only for religious organizations, but for all

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7. *See, e.g.*, Marcus, *The Grand Slam Grand Central Terminal Decision: A. Euclid for Landmarks, Favorable Notice for TDR And a Resolution of the Regulatory/Taking Impasse*, 7 Ecology Law Quarterly 731 (1979).

owners of landmarked buildings. Such a decision clearly merits a review by this Court.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DENIAL OF PETITIONER'S FIRST AMENDMENT CLAIMS.

A. The Court of Appeals Erred In Its Application Of *Employment Division v. Smith*.

Prior to its recent decision in *Employment Division v. Smith*, this Court had repeatedly held that a regulation imposing a substantial burden on the free exercise of religion could not be justified merely because the regulation appeared to be "neutral on its face." Such a burden, the Court had indicated, could only be justified by the showing of a "compelling governmental interest." *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136 (1989); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Smith*, however, the Court held that the compelling interest test was inapplicable to "an across–the–board criminal prohibition on a particular form of conduct." ___ U.S. at ___, 110 S.Ct. at 1603.

The Landmarks Law, with its aesthetic concerns and wholly discretionary applications, is hardly analogous to "an across–the–board criminal prohibition" or the "socially harmful conduct" addressed in *Smith*. Accordingly, the holding of *Smith* does not govern the present case. Indeed, even if *Smith* is read more broadly, to apply to any law that is "neutral" and "generally applicable," it is clear that the Landmarks Law is not such a regulation.

The Landmarks Law appears on its face to be neutral, *i.e.*, it makes no reference to religion or religious buildings except to provide an exemption for the interiors of places of worship. Landmarks Law § 25–303 a. (2), (70a). On the other hand, the provisions that authorize the landmarking of

individual buildings are not "generally applicable" in any meaningful sense of the term. The essence of the New York law — and any landmarks law — is selectivity. For example, to be landmarked pursuant to the New York law, a building must be determined to have "a special character or special historical or aesthetic interest or value." Landmarks Law § 25–302 n., (66a). By its nature, such landmarking will be applied to relatively few buildings.

The lack of general applicability is further manifested by the fact that the law has been applied disproportionately to religious buildings. Of approximately 600 individually landmarked buildings in New York City in 1986, 95 were religious buildings. Moreover, the impact of the law falls even more disproportionately upon those denominations for whom the beauty of their church buildings has been an important way to express religious belief: one third of the landmarked religious buildings are Episcopal churches. (A. 165–70).

The nature of the Landmarks Law is similar, in significant respects, to the flat licensing taxes invalidated in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944). Like the Landmarks Law, such taxes were "neutral", *i.e.*, they did not single out, or make any reference to, religious organizations. Nevertheless, they were found to place an unconstitutional burden on the free exercise of religion and this Court has emphasized the difference between such taxes and a "generally applicable sales tax." *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 587 n.9 (1983); *Jimmy Swaggart Ministries v. Bd. of Equalization*, ___ U.S. at ___, 110 S.Ct. at 694–695.

In *Swaggart* and *Minneapolis Star*, the Court pointed out that the license taxes invalidated in *Murdock* and *Follett* had imposed a prior restraint on the exercise of a constitutionally protected right. That observation is equally applicable to the Landmarks Law — which operates as a prior restraint on the exercise of religion by every church whose property has been landmarked. Compliance with the procedures of the Landmarks

Law is exacted as a precondition to any alteration of the church's own property — no matter how essential to the mission of the church. *See, infra,* pp. 15–16.

In addition to the court of appeals' failure to observe this Court's limitation of the holding in *Smith* to laws of general applicability, it also failed to acknowledge this Court's explicit recognition of two kinds of circumstances in which a compelling governmental interest was still required to justify burdens on free exercise rights. Although both of the circumstances identified in *Smith* are conspicuously present in the instant case, the court of appeals failed to address either.

First, *Smith* reaffirmed the principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason," ___ U.S. at ___, 110 S. Ct. at 1603, *citing Bowen v. Roy,* 476 U.S. 693, 708 (1986). In this case, it is clear that the Landmarks Law creates just such a "system of individual exemptions." Such a system is found in the statutory provisions for relief on the ground of "insufficient return" and in the judicial test formulated by the New York courts. *See, e.g., Society for Ethical Culture v. Spatt, supra.* It is equally clear that neither the statutory nor the judicial provisions for relief encompass any consideration of religious hardship. Indeed, the New York Court of Appeals explicitly excluded consideration of any religious hardship on the mistaken assumption that a church's use of its property to support its mission is "secular." 51 N.Y.2d at 456. The Commission, for its part, applies the same exclusion. *See, infra* p. 20.

Second, *Smith* pointed out that even the application of a "neutral, generally applicable law to religiously related action" had been barred in "hybrid" cases involving "other constitutional protections." ___ U.S. at ___, 110 S.Ct. at 1601–02. Specifically, the Court referred to free exercise cases also involving freedom of expression or the right of parental supervision. So here, the application of the Landmarks Law to churches involves not only the free exercise of religion but the rights of those churches, as property owners, under the Fifth

Amendment. Indeed, the latter rights, unlike the right of parental supervision, do not arise merely by inference but are enumerated in the text of the constitution.

The erroneous application of *Smith* permitted the court of appeals to avoid the issue of whether any compelling state interest could be found to justify the burden of the Landmarks Law. It is evident, however, that no such interest exists. Recognition of aesthetics as a permissible state goal, as in *Penn Central*, is plainly not the equivalent of recognizing it to be a compelling state interest.[8]

The absence of any compelling state interest is glaringly obvious under the facts herein. The applications of St. Bartholomew's before the Commission did not seek authority to demolish or modify in any way the only building on the site of any architectural distinction, *i.e.*, the church building. Both plans submitted by the church preserved the church building, as well as a garden in front of the community house.

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8. In *First Covenant Church v. City of Seattle, supra*, the Supreme Court of Washington carefully considered *Penn Central* and concluded:

> The appellants [in *Penn Central*] did not allege any violation of a fundamental right. Absent such a claim, the Court was able to employ minimal scrutiny in its analysis of New York City's Landmarks Preservation Law. Although the Court held that the landmarks law satisfied the limited inquiry of minimal scrutiny, it seems most likely the Court would not have reached the same result had it analyzed the law under strict scrutiny.
>
> We hold that the preservation of historical landmarks is not a compelling state interest. Balancing the right of free exercise with the aesthetic and community values associated with landmark preservation, we find that the latter is clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 525, 496 N.E.2d 183, (1986) (Meyer, J., dissenting), *cert. denied*, 479 U.S. 985 (1986). 787 P.2d at 1361.

(A. 238–42, 245–49; A. 462–66, 470–77). In short, the government's interest, if discernible at all in this case, could not justify a gross interference with the freedom of St. Bartholomew's to make use of its own property in support of the religious work for which it was organized.

B. The Court of Appeals Erred In Disregarding the Impact Of The Landmarks Law on Religious Organizations Generally and In The Standard It Applied To Petitioner.

The court of appeals viewed petitioner's First Amendment claims through a very narrow lens. The court declined to address at all the impact of the Landmarks Law on religious organizations generally. And, in the case of petitioner, the court found no burden upon the free exercise of religion so long as petitioner is able to raise sufficient funds to permit it to carry on its existing activities — at some undefined level — in its present facilities. That is a standard, we believe, that disregards basic values of the First Amendment.

1. The Burdens Of The Landmarks Law On Religious Organizations Generally.

The Landmarks Law, on its face, imposes burdens on religious organizations that severely impact upon the free exercise of religion. As a threshhold proposition, it is vitally important for a church to be able to devote its sanctuary and ancillary buildings to the support of the church's religious mission. And it is equally clear that the use of such buildings constitutes the exercise of religion, *i.e.*, it is conduct "rooted in religious belief." *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). If, however, the church site is landmarked, the ability of the church and its members to use the buildings on the site in accordance with the dictates of their faith is severely constrained.

If the church attempts to contest a proposed landmark designation, it will find that the applicable standard is exceedingly broad and exceedingly vague (*e.g.*, "special

character"). Landmarks Law § 25–302 n., (66a). In the courts below, respondents cited *Penn Central* to defend the vague and subjective standard of the Landmarks Law, but ignored the crucial point that *Penn Central* did not involve a First Amendment freedom.[9]

If a church is landmarked, the church, its clergy and members know that, under pain of criminal sanctions, their first priority must be not the funding of their programs in the practice of their religion, but preserving the landmark appearance of their buildings. Landmarks Law § 25–317, (95a – 96a). The church also knows that it can do *nothing* with respect to the exterior of its buildings without the permission of the Commission. The church's days of autonomy in the management of its affairs are over. As the Supreme Court of Washington pointed out in striking down the application of a similar ordinance to a church in Seattle:

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9. Thus, while Justice Brennan, writing for the Court in *Penn Central*, was willing to accept the vagueness and subjectivity of the Landmarks Law in the context of a claim under the takings clause, he later made it clear that very different considerations apply where, as here, important First Amendment rights are directly implicated. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 821–22 (1984):

> The fundamental problem in this kind of case is that a purely aesthetic state interest offered to justify a restriction on speech . . . creates difficulties for a reviewing court in fulfilling its obligation to ensure that government regulation does not trespass upon protections secured by the First Amendment. The source of those difficulties is the unavoidable subjectivity of aesthetic judgment — the fact that "beauty is in the eye of the beholder." As a consequence of this subjectivity, laws defended on aesthetic grounds raise problems for judicial review that are not presented by laws defended on more objective grounds — such as national security, public health, or public safety. In practice, therefore, the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to make the required inquiries. Brennan, J. dissenting. *Id.*

> The practical effect of the provisions is to require a religious organization to seek secular approval of matters potentially affecting the Church's practice of religion.

First Covenant Church v. City of Seattle, supra, 787 P.2d at 1359.

If a church seeks to alter its landmarked building, it must embark upon an administrative odyssey that is lengthy, expensive and lacking the most basic elements of procedural due process. First, the Landmarks Law requires the church to incur the expense of designing the proposed alteration without knowing what might or might not be accepted by the Commission. The design is then presented to the Commission with an application for a certificate of appropriateness that, like the initial designation, will be granted or denied solely on the basis of the aesthetic sensibilities of the eleven Commissioners. Landmarks Law § 25–307, (77a – 79a).

After a denial of a certificate of appropriateness, the church may then make an application on ground of "insufficient return". At this point, the church must submit to a broad and searching examination into its operations. *See infra* p. 20. Throughout that examination, the Landmarks Law fails to provide anything resembling an orderly procedure for the resolution of factual issues or even the right to respond to adverse evidence.[10]

The consequences of the foregoing are starkly apparent. To begin with, the church's loss of autonomy in the management of its affairs is, by itself, a matter of serious

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10. The Landmarks Law requires a public hearing but explicitly provides that "the commission in determining any matter as to which such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing." Landmarks Law § 25–313 b., (93a). In the present case, petitioner requested, but was denied, the opportunity to respond to testimony that provided the core of the Commission's findings. *See, supra* pp. 5–6.

consequence. *See Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 107–108 (1952) (legislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (National Labor Relations Board held not to have jurisdiction over church–operated schools).[11]

Important as it is, however, loss of church autonomy is by no means the only impact of the Landmarks Law upon the free exercise rights of religious institutions. The intent and the effect of the law is to place upon a church the "burdens of proof and persuasion" that the church is entitled to devote its own property to the support of its religious mission. The imposition of such burdens on the exercise of First Amendment rights is unacceptable. *Cf. First Unitarian Church v. Los Angeles,* 357 U.S. 545, 547 (1958); *Speiser v. Randall,* 357 U.S. 513, 529 (1958). Given the obscure standards and onerous procedures of the Landmarks Law, there are very few churches subject to the law that will have the fortitude and financial strength even to seek the relief that the law purports to provide. Thus, most churches will be required to forsake any steps to expand or maintain their religious missions that would involve a significant alteration of their facilities. The observation of *Speiser,* made in a different context, is nonetheless quite apt:

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11. As one commentator has summed up the law, "Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a constitutionally protected interest in managing their own institutions free of government interference." Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L. Rev. 1373, 1373 (1981). Professor Laycock's article was cited by Justice Brennan concurring in *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327 (1987), wherein the Court upheld the constitutionality of an exemption for religious organizations from a federal statute prohibiting religious discrimination in employment. 483 U.S. at 341. Justice Brennan further pointed out that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." 483 U.S. at 342.

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf. Dennis v. United States, supra,* provide but shifting sands on which the litigant must maintain his position. 357 U.S. at 526.

In short, the vagueness and overbreadth of the standards for designation, coupled with the intrusive and cumbersome provisions for relief, inevitably create a chilling effect on the practice of religion by a landmarked church. *Cf. Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984).

2. The Burden Of The Landmarks Law On St. Bartholomew's And The Erroneous Standard Applied By The Court Of Appeals.

The court of appeals acknowledged that "the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs." (13a). Remarkably, however, the court found that fact to have no constitutional significance:

> Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. *See Jimmy Swaggart Ministries v. Board of Equalization,* ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner,* ___ U.S. ___, 109 S.Ct. 2136 (1989). (*Id.*)

That conclusion, we submit, clearly misapplies the holdings of *Hernandez* and *Swaggart.*

To begin with, both *Hernandez* and *Swaggart* involved "generally applicable" laws. For the reasons previously discussed, that characterization cannot be applied to the Landmarks Law. Second, the magnitude of the financial

burdens involved in *Hernandez* and *Swaggart* did not remotely approach that imposed by the Landmarks Law on St. Bartholomew's. Both cases involved the relatively minimal impact of an incrementally larger tax burden. The Court in *Swaggart*, moreover, expressly recognized that a quite different question would be presented by a "more onerous tax rate" that "might effectively choke off an adherent's religious practices." ___ U.S. at ___, 110 S.Ct. at 688.

The court of appeals apparently read *Swaggart* to mean that an economic burden is irrelevant unless the effect is to choke off religious practices *entirely*. So severe a standard is neither required nor justified by that case. Where, as here, a law is conceded to have the effect of "drastically restricting" the revenue available to support a church's mission, that fact should not be ignored on the grounds that the church may nevertheless be able to devise a method of surviving at some reduced level.

The court of appeals failed to recognize how directly the constraints of the Landmarks Law may coerce a church and prevent its congregation from acting in accord with their religious beliefs. Specifically, the resources of the church may be — as they most surely have been in this case — diverted from a use commanded by the religious faith of its members and appropriated to serve a secular purpose. In supporting the application of St. Bartholomew's before the Commission in this case, the then Bishop of the New York Diocese, Paul Moore, expressed it simply and clearly. After reviewing the parable of Judgment Day from Matthew 25 he said:

> In this parable, as in the First Sermon, as in the Sermon on the Mount, as in the whole life and death upon the cross, Jesus Christ set compassion and justice at the very heart of our religion. Indeed, he said it is the basis on which we are ultimately judged.
>
> Would you deny us our right to practice our religion? Would you deny us the means to pick up as best we can the burden of the poor that the public sector has so shamelessly laid down? Would you prevent us from

> sheltering the homeless, feeding the hungry, caring for desperate children in a city which in these days has seemed to have lost its heart?
>
> Under our polity all the churches and institutions of our diocese which serve the poor are dependent on churches like St. Bartholomew's. Denying a hardship petition today would be the denial of our right as Christians to carry out the very heart of our mission. (2/477–78).

That plea, however, fell on deaf ears. The Commission, citing *Ethical Culture*, ruled that the Church's desire to secure funds "to maintain its current ministry and to respond to the future demands of the City, while commendable and understandable, cannot be the basis for establishing a showing of hardship ...." (7/2459). The court of appeals was similarly unmoved. The standard it applied excluded from consideration all but the most extreme form of religious hardship, *i.e.*, inability to continue. So broad a disregard of religious hardship, however, cannot be justified in the absence of some compelling state interest. And here, we repeat, there is none.

Finally, the court of appeals brushed aside, in a footnote, the entanglement between church and state spawned by the Landmarks Law:

> The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement. (14a).

That depiction of the operation of the Landmarks Law totally misapprehends the reality of proceedings before the Commission. What the court of appeals failed to appreciate is that the purported scrutiny of matters "financial and

architectural" leads inexorably into the details of virtually every facet of a church's operations, priorities and motivations.[12]

Such issues and such proceedings bear no resemblance to the routine administrative and recordkeeping obligations involved in *Jimmy Swaggart Ministries*. Indeed, they represent a breadth and depth of entanglement that is unparalleled in any reported case. It is, we submit, unique and unacceptable.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DENIAL OF PETITIONER'S CLAIM UNDER THE FIFTH AMENDMENT.

The court of appeals also applied its free exercise standard to petitioner's claim under the takings clause of the Fifth Amendment. Specifically, the court rejected the takings claim because it believed that petitioner is able to conduct its existing charitable and religious activities in the present facilities. That standard, however, is inconsistent with the only authority of this Court cited by the court of appeals, *Penn Central Transportation Company v. New York City, supra.* It also conflicts with subsequent decisions of this Court and with the constitutional test adopted by the New York Court of Appeals with respect to the landmarking of buildings owned by charitable institutions.

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12. The record below abundantly illustrates that fact. For example, in the hearings before the Commission, the Church was called upon to address such issues as: the decision to close the church sanctuary to the public on weekdays, the size of the Rector's apartment, the number and level of compensation of the clergy employed by the church, the manner (and propriety) of providing of food and shelter to the homeless, the managerial expertise of the Vestry, and how and for what purposes the Church's fundraising capacity should be employed. (2/598, 604–606, 639–40; 3/1032–38; 4/1144–45, 1159–61, 1163–84, 1276–77).

1. The *Penn Central* Analysis.

In *Penn Central*, the Landmarks Law had been applied to prevent the erection of a tower above Grand Central Terminal. The decision of the Court upholding that application turned upon its assessment of the "severity of the impact of the law on [Penn Central's] parcel" 438 U.S. at 136. Addressing that issue, the majority noted that the Landmarks Law did not interfere with the existing use of the property as a railroad terminal. Upon making that observation, however, the Court immediately pointed out that "[m]ore importantly" the record showed that Penn Central not only received a profit on the Terminal but "a 'reasonable return' on its investment." *Id.*

The majority then found that the impact of the law was mitigated by two factors indicating that Penn Central had not in fact lost all or most of its development rights, *i.e.*, the air rights above the Terminal. First, the Court pointed out that after the initial rejection, Penn Central had not proposed an alternate design and suggested that the Commission might approve a smaller building. Second, the Court pointed out that the air rights above the Terminal could be transferred to various buildings owned by Penn Central that were adjacent to the Terminal and, therefore, eligible to receive a transfer of such air rights. 438 U.S. at 137.

In the present case, the court of appeals sustained the finding of the district court that petitioner was able to continue to use the community house and held that fact to be dispositive. The key factors in the *Penn Central* analysis were dismissed as irrelevant or brushed aside in conclusory terms. By that process, we submit, the court of appeals lost sight of the meaning of *Penn Central*.

To begin with, the basic premise of the court of appeals — continued use of the property — rests upon an analysis wholly unlike anything found in *Penn Central*. Specifically, the premise rests upon an assessment of the adequacy of the property, the cost of addressing its deficiencies *and* the ability of petitioner to bear that cost.

With respect to the cost of repair and rehabilitation, petitioner had pointed out various errors in the $3 million estimate accepted by the district court, including the total omission of $1.5 million of work. The court of appeals, however, held that "even if the potential cost of repair totaled $4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense." (20a – 21a).

That conclusion of the court of appeals rested upon a seriously distorted view of the petitioner's financial condition. More importantly, however, the court's focus on the financial capacity of the Church represented a significant departure from the analysis of *Penn Central*. The effect of that focus is to make the fact of a taking turn not on the severity of the impact of the law on "the parcel," as in *Penn Central*, but upon the financial resources of the person or entity who happens to own the parcel. Such a mode of analysis finds no support in the decisions of this Court or concepts of basic fairness.

The court of appeals further departed from *Penn Central* in disregarding the factor of "reasonable return". In this case, it was demonstrated beyond serious argument that, if the Church's community house were devoted to commercial purposes, it would *not* yield a reasonable return.[13] The court of appeals, however, dismissed that fact as "irrelevant" on the grounds that the existing use of the community house was for charitable rather than commercial purposes. In lieu of a "reasonable return" the court of appeals simply referred once again to the posited continued use of the community house by petitioner. The court, however, ignored the fact that continued

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13. The court of appeals indicated that "the use of the Community House would yield an estimated return of only six percent." (17a). In fact, the record showed that it would yield a return of *less than six percent of assessed valuation*. (A. 490). As the New York Court of Appeals has made clear, assessed valuation is not a proper basis on which to determine reasonable return. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 114 n. 13, 542 N.E.2d 1059, 1070 n. 13, *cert. denied sub nom. Wilkerson v. Seawall Associates*, ____ U.S. __, 110 S.Ct. 500 (1989).

use alone had not been deemed sufficient in *Penn Central*. On the contrary, as we have shown, this Court had found it to be more important that Penn Central was able to derive a reasonable return from such use.

The inability of a charitable owner to derive a reasonable return from a landmarked site may not, by itself, be dispositive. Such inability, however, makes it even more important to determine whether the impact of the Landmarks Law is mitigated by any other factor. Here it is not and the severity of that impact — destroying more than eighty percent of the value of "the parcel" — remains wholly unmitigated.

In *Penn Central*, the Court questioned whether Penn Central had lost all of the value of the air rights above the Terminal since the Commission had not ruled out the possibility of approving an alternative design for a smaller building. In this case, the court of appeals sought to apply that analysis to petitioner, but the facts herein do not fit. In this case, petitioner did precisely what this Court had suggested in *Penn Central* — after its first application was rejected, it returned with a second proposal specifically designed to respond to the Commission's objections to the first application and proposing a significantly smaller building.

Nevertheless, the court of appeals attempted to draw a parallel with *Penn Central*, stating that respondent had "invited appellant to propose an addition to the Community House in the instant matter." (17a). In fact, however, the only "addition" that respondent ever indicated it might accept was a two-story expansion. (A. 825–27, A. 839–40). Such an addition might alleviate some of petitioner's space problems, but it would generate no revenue to recover the cost of the expansion, let alone any funds for support of petitioner's mission or for repair and rehabilitation of the church and community house.

The present case also differs from *Penn Central* in that petitioner has no feasible means of transferring its development rights to another site. As this Court noted in *Penn Central*, air rights are transferable only to a contiguous site, *i.e.*, across the

street or across an intersection. 438 U.S. at 113–14. Petitioner, unlike Penn Central, owns no other properties to which its air rights could be transferred and has no other prospects for such a transfer. (A. 388–95). Thus, although the court of appeals suggested that petitioner's rights are not "worthless," it is clear that such rights have no immediate value and that their possible value at some future time is, at best, wholly speculative. If that does not make petitioner's development rights "worthless," it comes very close indeed.

2. The Cases Subsequent to *Penn Central.*

While *Penn Central* is the only decision of this Court involving the Landmarks Law, or landmarking in general, it is by no means the only decision relevant to the issues herein. In *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), as in *Penn Central,* the Court rejected a claim under the takings clause. The analysis of the Court in *Keystone,* however, clearly supports St. Bartholomew's claims.

(a) The nature of the State interest and "reciprocity of advantage". In *Keystone,* the Court rejected a challenge to the facial validity of a law prohibiting the mining of certain coal to prevent the subsidence of the surface estate. The law appeared to be similar in purpose and effect to a law that the Court had invalidated in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). In *Keystone,* however, the Court distinguished the later statute on the ground that it was more clearly designed to protect important public interests. The Court emphasized that "the nature of the State's action is critical in takings analysis" and cited the numerous takings cases that had involved a "noxious use" or some use of property analogous to a common law nuisance. The Court also gave renewed importance to the concept of "reciprocity of advantage" that was first articulated by Justice Holmes in *Pennsylvania Coal* and had been stressed by then Justice Rehnquist, dissenting in *Penn Central,* 438 U.S. at 144–50.

In sustaining the facial validity of the Landmarks Law in *Penn Central,* the Court had, by footnote, appeared to

minimize the importance of whether the challenged regulation sought to restrain a "noxious" use 438 U.S. at 133–34, n. 30. The decision in *Keystone*, however, restored that factor to the forefront of takings analysis. That is not to say, and we do not urge, that a regulation is necessarily invalid if it is not addressed to a noxious use or some analogous condition. Thus, we do not seek to overturn the determination in *Penn Central* that the Landmarks Law is facially valid. Nevertheless, when a particular application of that law is challenged, the nature of the law — and hence the nature of the government's interest — remains highly relevant.

In the present case, the governmental interest is remarkably weak. As previously shown, the proposed development would leave the church building unimpaired. *See, supra,* p.13. Moreover, development of the community house site would provide the funds that are desperately needed to restore and preserve the church building.[14]

Similarly, the absence of any reciprocity of advantage enjoyed by petitioner is striking. A landowner who is burdened by the restrictions of a zoning law or a historic district receives the benefit of the same restrictions being applied to adjacent landowners. *See Penn Central, supra,* 438 U.S. at 147, Rehnquist, J., dissenting. Where individual buildings are landmarked, however, any benefit to the owner from the landmarking of other buildings is attenuated at best. Indeed, this case stands any concept of a reciprocity of advantage on its head.

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14. Indeed, the application of the Landmarks Law in the present case fails to meet the fundamental requirement of substantially advancing a legitimate state interest. *See Nollan v. California Coastal Comm.*, 483 U.S. 825, 834–35 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Nectow v. Cambridge*, 277 U.S. 183 (1928). The court of appeals held that the governmental interest identified in *Penn Central* was "equally applicable" in the present case but made no attempt to support that conclusion with any analysis of the impact of the proposed building.

When St. Bartholomew's was built in 1918, and for many years thereafter, Park Avenue was zoned for residential use. The Church shared with its neighbors the benefits and limitations of that designation. The zoning law, however, was subsequently changed to permit commercial development. After World War II, commercial development blossomed and, ultimately, became all encompassing. While the City realized millions of dollars in tax revenues from that development, it resulted in the displacement of the Church's neighborhood congregation and the concomitant weakening of its financial viability. (A. 209; A. 375). Ironically, the City now seeks to prevent petitioner from adapting to the very environment the City itself created.

(b) The value of the property taken. *Keystone* made it clear that the test for a regulatory taking *requires* a court to consider the value taken from the property. 480 U.S. at 497. In this case, viewing the Church's property as a whole, the value taken from the property is $140 million, while the value remaining is $35 million. The court of appeals acknowledged that a large value had been taken from the property: "In this particular case, the revenues are very large because the Community House is on land that would be extremely valuable if put to commercial use." (13a). Contrary to the command of *Keystone*, however, the court of appeals proceeded to ignore that value — holding that the *only* fact to be considered was the Church's continued ability to use the property.

Following *Keystone*, this Court upheld takings claims in two cases decided the same term. *Hodel v. Irving*, 481 U.S. 704 (1987) held that a taking was effected by a law that prohibited the devise of fractional shares of Indian lands. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), found a taking in the required grant of an easement across the owner's property. More recently, in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, *cert. denied sub nom. Wilkerson v. Seawall Associates*, ___ U.S. ___, 110 S.Ct. 500 (1989), the New York Court of

Appeals provided a careful analysis of the decisions in *Penn Central, Keystone, Hodel* and *Nollan.*

In *Seawall*, the court struck down the City's law regulating single-room occupancy properties on the ground, *inter alia*, that it destroyed the right to develop such properties. The court noted that in *Penn Central* and *Keystone*, the Supreme Court had held, under the facts of those cases, that the partial loss of development rights did not constitute a taking. On the other hand, the court observed, *Hodel* and *Nollan* had each found a taking in the total loss of a single element of property value.

The *Seawall* opinion suggested that decisions in the later cases, *Hodel* and *Nollan*, had moved toward acceptance of the theory of "'conceptual severance,' [*i.e.*, assessing only the value of the rights taken without regard to its relationship to the value of the whole property]". 74 N.Y. 2d at 110, 542 N.E. 2d at 1067. Under the facts of *Seawall*, however, the court found the loss of development rights to be a taking under either approach:

> By any criterion — whether the property rights abolished or impaired are considered alone, as in *Hodel* and *Nollan*, or the values of these rights are compared with the values of the properties as a whole, as in *Penn Central* and *Keystone* — the conclusion is inescapable that the effect of the [law] is unconstitutionally to deprive owners of economically viable use of their properties. 74 N.Y.2d at 110, 542 N.E.2d at 1068.

So here, the property rights appropriated by the Landmarks Law may be considered alone or in comparison to the value of the property as a whole. In either event, the fact of a taking is inescapable. What is not permissible, we submit, is the course taken by the court of appeals — to simply disregard the value of the property taken.

3. Conflict With the New York Court of Appeals.

As shown in the preceding section, the decision of the court of appeals herein is fundamentally at odds with the analysis of the New York Court of Appeals in *Seawall Associates*. In addition, the decision is also in conflict with the constitutional standard adopted by that court with respect to the application of the Landmarks Law to charitable institutions.

Specifically, as we have earlier noted, the standard adopted by the New York Court of Appeals is to determine whether landmark designation "physically or financially prevent[s] *or seriously interferes with* the carrying out of the charitable purpose" (emphasis added). *Society for Ethical Culture v. Spatt*, 51 N.Y.2d at 455, 415 N.E.2d at 925 (1980). Both the district court and the court of appeals cited *Ethical Culture* with apparent approval. Yet, both courts proceeded to apply a drastic – but wholly unexplained – redaction of the *Ethical Culture* test. Specifically, both courts transformed the test into a requirement of proof that petitioner "can no longer carry out" its charitable purposes. Thus, they distorted the test by excising the key phrase "or seriously interferes with." As a result, the test applied below is one that is in clear conflict with the decisions of the New York Court of Appeals. It is a test, we submit, that this Court should decisively reject.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: December 10, 1990

Respectfully submitted,

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APPENDIX

The RECTOR, WARDENS, AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, Plaintiff-Appellee (Re: 88-7751), Plaintiff-Appellant (Re: 90-7101),

v.

The CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, Defendants-Appellees (Re: 88-7751, 90-7101).

Appeal of The COMMITTEE TO OPPOSE the SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeline Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman, and Charlotte Pierce Armstrong, (Re: 88-7751).

Nos. 1431, 1432, Docket 88-7751, 90-7101.

United States Court of Appeals, Second Circuit.

Argued July 17, 1990.

Decided Sept. 12, 1990.

914 F.2d 348

Church brought action against city Landmarks Preservation Commission alleging that application of Landmarks Preservation Law to church imposed unconstitutional burden on free exercise of religion and effected a taking of property without compensation. The United States District Court for the Southern District of New York, John E. Sprizzo, J., 728 F. Supp. 958, found that Landmarks Law did not violate right to free exercise of religion or right against taking of property without just compensation. Appeal was taken. The Court of Appeals, Winter, Circuit Judge, held that: (1) Landmarks

Law, as applied to auxiliary structure next to church's main house of worship, was not unconstitutional burden of free exercise of religion and did not effect taking of property without just compensation; (2) church failed to show that any space deficiency in building could not be remedied by expansion consistent with Landmarks Law; and (3) church failed to show prospective financial hardship entitling it to certificate of appropriateness.

Affirmed.

Douglas M. Parker, New York City (Judah Gribetz, Howard W. Goldstein, George A. Pierce, Mudge Rose Guthrie Alexander & Ferdon, Henry P. Kent Greenawalt, James G. Glazebrook, New York City, of counsel), Monaghan, for plaintiff–appellee (Re: 88–7751), plaintiff–appellant (Re: 90–7101).

Elizabeth Dvorkin, New York City (Victor A. Kovner, Corp. Counsel of the City of New York, Leonard Koerner, Jonathan L. Pines, Dorothy Miner, New York City, of counsel), for defendants–appellees (Re: 88–7751 and 90–7101).

Gerald D. Fischer, New York City, for appellants (Re: 88–7751), amici curiae Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman and Charlotte Pierce Armstrong (Re: 90–7101).

Donald G. Glascoff, Jr., Robert Knuts, Cadwalader, Wickersham & Taft, New York City, for amici curiae New York State Interfaith Com'n on Landmarking of Religious Property, Council of Churches of the City of New York, Inc., Queens Federation of Churches, New York State Council of Churches, Nat. Council of Churches of Christ in the U.S.A., Nat. Ass'n of Evangelicals, Baptist Joint Committee on Public Affairs, Evangelical Lutheran Church in America, New York Bd. of Rabbis, Dept. of Church in Soc., Div. of Homeland Ministries, Christian Church (Disciples of Christ), and

Americans United for the Separation of Church and State (Re: 90–7101).

Lee Boothby, Boothby, Ziprick & Yingst, Berrien Springs, Michigan, for amicus curiae Council on Religious Freedom (Re: 90–7101).

George J. McCormack, Cusak & Stiles, New York City, Kevin M. Kearney, Hurley, Kearney & Lane, Brooklyn, New York, for amici curiae Roman Catholic Archdiocese of New York, Roman Catholic Diocese of Brooklyn, and New York State Catholic Conference (Re: 90–7101).

Frank Patton, Jr., Ellis, Stringfellow & Patton, New York City, for amicus curiae Church of St. Paul and St. Andrew (Re: 90–7101).

John J. Kerr, Jr., Elizabeth P. Johnson, Nancy B. Mallery, Simpson Thacher & Bartlett, New York City, for amici curiae Nat. Trust for Historic Preservation, National Center for Preservation Law, New York Landmarks Conservancy, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc. (Re: 90–7101).

William E. Hegarty, Howard G. Sloane, Cahill, Gordon & Reindel, New York City, for amicus curiae Municipal Art Soc. of New York, Inc. (Re: 90–7101).

Before WINTER and WALKER, Circuit Judges, and MUKASEY,* District Judge.

WINTER, Circuit Judge:

This appeal poses the question of whether a church may be prevented by New York City's Landmarks Law, now codified at New York City Administrative Code Sections 25–301 to 25–321 (1986), from replacing a church–owned building with an office tower. The question implicates both First and Fifth Amendment issues. Specifically, the Rector, Wardens, and

Members of the Vestry of St. Bartholomew's Church ("the Church") appeal from Judge Sprizzo's decision that the New York City Landmarks Law, as applied to an auxiliary structure next to the Church's main house of worship, did not impose an unconstitutional burden on the free exercise of religion or effect a taking of property without just compensation.

The district court grounded its decision on its finding that the Church had failed to prove that the landmark regulation prevented the Church from carrying out its religious and charitable mission in its current buildings. We agree that this is the legal standard established by Supreme Court precedent governing both free-exercise and takings claims. Moreover, we find no clear error in the district court's factual determinations. We therefore affirm. We also affirm the denial of a motion to intervene by a group of persons opposed to the Church's plans to develop its property.

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized in 1835 under the laws of the State of New York as a not-for-profit religious corporation. The main house of worship ("the Church building") stands on the east side of Park Avenue, between 50th and 51st Streets, in New York City. Constructed beginning in 1917 according to the plans of architect Bertram G. Goodhue, the Church building is a notable example of a Venetian adaptation of the Byzantine style, built on a Latin cross plan. Significant features include its polychromatic stone exterior, soaring octagonal dome, and large rose window. Perhaps most significantly, Goodhue incorporated into his building the Romanesque porch of St. Bartholomew's former Church building at Madison Avenue and 44th Street.

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* Hon. Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

Designed by the renowned architectural firm of McKim, Mead & White, the porch is composed of a high arched central portal flanked by two lower arched doorways, all supported by slender columns. The doors themselves are richly decorated bronze, depicting Biblical themes.

Adjacent to the Church building, at the northeast corner of Park Avenue and 50th Street, is a terraced, seven–story building known as the Community House. It is the replacement of this building with an office tower that is at issue in the instant matter. Completed in 1928 by associates of Goodhue, the Community House complements the Church building in scale, materials and decoration. Together with the Church building, the Community House houses a variety of social and religious activities in which the Church is engaged. It contains a sixty–student preschool, a large theater, athletic facilities (including a pool, gymnasium, squash court, and weight and locker rooms), as well as several meeting rooms and offices for fellowship and counseling programs. A community ministry program, which provides food, clothing, and shelter to indigent persons, is operated mainly from the Church building. Meals are prepared in a small pantry on the first floor and served in the mortuary chapel. Ten homeless persons are housed nightly in the narthex.

In 1967, finding that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City," the Landmarks Preservation Commission of the City of New York (the "Commission") designated both buildings as "landmarks" pursuant to the Landmarks Law. This designation prohibits the alteration or demolition of the buildings without approval by the Commission. *See* N.Y.C. Admin. Code § 25–305(a)(1)(1985).

The Church did not object to the landmarking of its property. In December 1983, pursuant to what is now New York City Administrative Code Section 25–307, the Church

applied to the Commission for a "certificate of appropriateness" permitting it to replace the Community House with a fifty–nine story office tower. This request was denied as an inappropriate alteration. In December 1984, the Church filed a second application, scaling down the proposed tower to forty–seven stories. This application was also denied.

The Church thereafter filed a third application under a different procedure. Pursuant to Sections 207–4.0 and 207–8.0 of the New York City Administrative Code,[1] commonly known as the "hardship exception," it sought a certificate of appropriateness for the forty–seven story tower on the ground of the Community House's present inadequacy for church purposes. The Church's application was the subject of a series of public hearings before the Commission in late 1985 and early 1986. At those hearings, the Commission gathered evidence from various interested parties, including expert testimony and written reports regarding the adequacy of the Community House for the Church's charitable programs, the necessity and cost of structural and mechanical repairs for the Church building and Community House, and the Church's financial condition. Following the public hearings, the Commission convened in Executive Session, open to the public, on several occasions in February 1986. At these meetings the Commission discussed the Church's application, accepted further submissions from interested parties, and took testimony and reports from its own pro bono experts. On February 24, the Commission voted to

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1. Now found at Section 25–309, the provision states that a certificate of appropriateness shall be granted to a not–for–profit applicant who shows, *inter alia,* that such

> improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is not [sic] longer engaged in pursuing such purposes.

N.Y.C. Admin. Code § 25–309(a)(2)(c)(1985).

deny the application because the Church had failed to prove the necessary hardship. Several months later the Commission issued a lengthy written determination detailing the reasons for its denial.

On April 8, 1986, the Church brought the instant action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. The complaint set forth a host of constitutional claims. It alleged that the Landmarks Law, facially and as applied to the Church, violates both the free exercise and establishment clauses of the First Amendment by excessively burdening the practice of religion and entangling the government in religious affairs. It also alleged that the Landmarks Law violates the equal protection and due process clauses of the Fourteenth Amendment because it applies different standards to charitable and commercial institutions respectively and constitutes a taking of property without just compensation. In addition, the Church alleged a variety of procedural due process violations and brought a pendent state law claim alleging that the Church should have been granted a certificate of appropriateness under New York law.

The Church moved for partial summary judgment on its claims of facial unconstitutionality. Defendants cross–moved for summary judgment on all claims. The district court granted summary judgment to defendants with respect to the issues of facial unconstitutionality only. On the First Amendment claims, the court ruled that the Landmarks Law "creates no more than an incidental burden on the practice of religion" and that entanglement doctrine was not applicable. On the equal protection claim, the court ruled that the different hardship tests applied to charitable and commercial organizations were rational. Finally, it held that the notice and hearing provisions of the Landmarks Law comport with constitutional standards of due process.

The district court then held a bench trial with respect to the claims that the Landmarks Law is unconstitutional as applied to the Church. The parties agreed that the evidentiary

record before the district court would be limited to the evidence presented to the Commission, contained in a twenty–three volume appendix. In considering the Church's takings claim, the court adopted the standard articulated by New York State courts: An unconstitutional taking exists "where the landmark designation [of property owned by a charitable organization] would prevent or seriously interfere with the carrying out of the charitable purpose of the institution." *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 966–967 (S.D.N.Y. 1989)(opinion and order)(*citing Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454–55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974)). The district court applied the same test to the claim of an unconstitutional burden on religion. It thus stated, "[I]n this case, the First Amendment inquiry is identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities." *Id.* 728 F. Supp. at 966–967.

The district court then examined the record before the Commission in order to determine whether the Church had proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. The district court found that it had not, for three basic reasons. First, it ruled that the Church had failed to demonstrate that the Community House is insufficient to accommodate the various programs currently based there. Second, it found that the Church had exaggerated the cost of the necessary repairs to the structural and mechanical systems of the Church building and Community House. Third, the court held that the Church had failed to prove that it cannot afford to make the necessary repairs and renovations to its buildings. Having concluded that the Church had not carried its burden of demonstrating that the Landmarks Law precludes it from continuing its activities in its existing facilities, the district court rejected the Church's First

and Fifth Amendment claims and entered judgment for defendants.[2]

On appeal, the Church renews its free exercise and takings claims and argues that the district court's factual findings were clearly erroneous.

In the course of proceedings, the district court denied a motion to intervene on the side of defendants made by several individual parishioners and the Committee to Oppose the Sale of St. Bartholomew's Church Incorporated, a group of St. Bartholomew's members and others opposed to commercial development of the Church's property. It held that the proposed intervenors had no ownership interest in the property at issue and that their participation would interfere with the efficient administration of the litigation. *See St. Bartholomew's Church v. City of New York,* No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Oct. 27, 1986)(order denying motion to intervene). A year later, after the parties agreed that the trial in the instant action should be conducted solely on the record before the Commission, the proposed intervenors renewed their motion, which was again denied. *See St. Bartholomew's Church v. City of New York,* No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Apr. 6, 1988)(order denying motion to intervene). The proposed intervenors appeal from this ruling.

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2. The district court treated the Church's remaining procedural due process and state law claims as abandoned, because the Church had disavowed any interest in having a new hearing before the Commission, the only relief available to remedy these claims.

DISCUSSION

Sections 1 and 2 of this portion of the opinion reject the Church's free exercise and takings claims. Our discussion assumes the affirmance of the district court's factual findings as detailed in section 3.

1. *The Free Exercise Claim*

The Church argues that the Landmarks Law substantially burdens religion in violation of the First Amendment as applied to the states through the Fourteenth Amendment. In particular, the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and the Landmarks Commission (collectively, "the City") have impaired the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission. It argues that the Community House is no longer a sufficient facility for its activities, and that the Church's financial base has eroded. The construction of an office tower similar to those that now surround St. Bartholomew's in midtown Manhattan, the Church asserts, is a means to provide better space for some of the Church's programs and income to support and expand its various ministerial and community activities. The Church thus argues that even if the proposed office tower will not house all of the Church's programs, the revenue generated by renting commercial office space will enable the Church to move some of its programs—such as sheltering the homeless—off-site. The Church concludes that the Landmarks Law unconstitutionally denies it the opportunity to exploit this means of carrying out its religious mission. Although the Landmarks Law substantially limits the options of the Church to raise revenue for purposes of expanding religious charitable activities, we believe the Church's claims are precluded by Supreme Court precedent.

As the Court recently stated in *Employment Division v. Smith*, ___ U.S. ___, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the free exercise clause prohibits above all "'governmental

regulation of religious beliefs as such.'" *Id.* 110 S.Ct. at 1599 (*quoting Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963) and citing cases). No one seriously contends that the Landmarks Law interferes with substantive religious views. However, apart from impinging on religious beliefs, governmental regulation may affect conduct or behavior associated with those beliefs. Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. For example, in Smith the Court held that the free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of peyote. *See* 110 S.Ct. 1595. *Cf. United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

The synthesis of this caselaw has been stated as follows: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 110 S.Ct. at 1600 (*quoting Lee*, 455 U.S. at 263 n.3, 102 S.Ct. at 1058 n. 3 (Stevens, J., concurring)). The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented. *See id.* 110 S.Ct. at 1599.

The Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions. It thus applies to "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value." N.Y.C. Admin. Code § 25–302(n)(1986).

It is true that the Landmarks Law affects many religious buildings. The Church thus asserts that of the six hundred landmarked sites, over fifteen percent are religious properties and over five percent are Episcopal churches. Nevertheless, we do

not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having "special character or special historical or aesthetic interest or value"—set forth by the Landmarks Law. N.Y.C. Admin. Code § 25–302(n)(1986). This, however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

The Church's brief cites commentators, including a former chair of the Commission, who are highly critical of the Landmarks Law on grounds that it accords great discretion to the Commission and that persons who have interests other than the preservation of historic sites or aesthetic structures may influence Commission decisions.[3] Nevertheless, absent proof of the discriminatory exercise of discretion, there is no constitutional relevance to these observations. Zoning similarly regulates land use but it is hardly a process in which the exercise of discretion is constrained by scientific principles or unaffected by selfish or political interests, yet it passes constitutional muster. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

The Church argues that landmarking and zoning differ in that landmarking targets only individual parcels while zoning affects larger segments. However, the Landmarks Law permits the designation of historic districts, see N.Y.C. Admin. Code § 25–303(a)(4)(1986), while all zoning laws provide for variances for individual sites. Even if the two forms of regulation bear the different characteristics asserted by the Church, those

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3. The Landmarks Law made a cameo appearance in a recent best-selling novel as a vehicle for political retaliation against a clerical official seeking to develop Church property. *See T. Wolfe, Bonfire of the Vanities*, 569 (1987) ("Mort? You know that church, St. Timothy's? ... Right ... LANDMARK THE SON OF A BITCH!").

differences are of no consequence in light of *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). There, the Court stated:

> [L]andmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land–use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land–use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest whenever they might be found in the city....

Id. at 132, 98 S.Ct. at 2663 (citation omitted).

It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. *See Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990); Hernandez v. Commissioner, ___ U.S. ___, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices. In *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988), the Court explained,

> It is true that ... indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the

> First Amendment.... This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit" ...

We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities. Cf. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988).

In sum, the Landmarks Law is a valid, neutral regulation of general applicability, and as explained below, we agree with the district court that the Church has failed to prove that it cannot continue its religious practice in its existing facilities.[4]

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4. The Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause. The district court dismissed this argument as irrelevant in the present context, reasoning that the entanglement doctrine applies only to instances of government funding of religious organizations. However, in Jimmy Swaggart Ministries the Supreme Court considered an entanglement claim in the context of government taxation of the sale of religious materials by a religious organization. The Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization. *See* 110 S.Ct. at 697–99. These same factors are of course largely true of the Landmarks Law. The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement.

2. *The Takings Claim*

The Church also claims that the Landmarks Law so severely restricts its ability to use its property that it constitutes confiscation of property without just compensation in violation of the Fifth and Fourteenth Amendments.[5] However, the Supreme Court's decision in *Penn Central* compels us to hold otherwise.

In Penn Central, the Supreme Court held that the application of New York City's Landmarks Law to Grand Central Terminal did not effect an unconstitutional taking. *See* 438 U.S. at 138, 98 S.Ct. at 2666. That famous beaux arts style train station, located in midtown Manhattan (just eight blocks from St. Bartholomew's Church) was designated a landmark in 1967. *See id.* at 115–16, 98 S.Ct. at 2654–55. Shortly thereafter, Penn Central Transportation Company ("Penn Central"), principal owner of the Terminal, in order to increase its income, sought to build a high–rise office tower atop the Terminal. The Landmarks Commission, however, denied the proposal because "'[q]uite simply, the tower would overwhelm the Terminal by its sheer mass.'" *Id.* at 118, 98 S.Ct. at 2656 (quoting the record on appeal). The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally "taken" its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use

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5. The Fifth Amendment provides in part, "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, and is applicable to the states through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

> the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id. at 136, 98 S.Ct. at 2665.

Applying the *Penn Central* standard to property used for charitable purposes, the constitutional question is whether the land–use regulation impairs the continued operation of the property in its originally expected use. We conclude that the Landmarks Law does not effect an unconstitutional taking because the Church can continue its existing charitable and religious activities in its current facilities. Although the regulation may "freeze" the Church's property in its existing use and prevent the Church from expanding or altering its activities, Penn Central explicitly permits this. In that case, the Landmarks Law diminished the opportunity for Penn Central to earn what might have been substantial amounts by preventing it from building a skyscraper atop the Terminal. Here it prevents a similar development by the Church—one that, in contrast to the proposal to build an office tower over Grand Central Terminal, would involve the razing of a landmarked building—at least so long as the Church is able to continue its present activities in the existing buildings. In both cases, the deprivation of commercial value is palpable, but as we understand Penn Central, it does not constitute a taking so long as continued use for present activities is viable.

The Church offers several arguments to distinguish Penn Central, but we find them unavailing. First, it argues that while Penn Central stipulated that it was able to earn a "reasonable

return" on the Termin... ove... under the regulation, *see* 438 U.S. at 129, 98 S.Ct. at 2662, in this case, the use of the Community House for commercial purposes would yield an estimated return of only six percent. Even if true, this fact is irrelevant. "Reasonable return" analysis was appropriate to determine the viability of the existing commercial use of the Terminal but has no bearing on the instant matter because the existing use of the Community House is for charitable rather than commercial purposes. So long as the Church can continue to use its property in the way that it has been using it—to house its charitable and religious activity— there is no unconstitutional taking.

Second, the Church notes that it presented a second proposal for a smaller building to the Commission, but Penn Central did not. This hardly makes any difference. Just as the Commission in Penn Central remained open to a building addition that "'would harmonize in scale, material and character,' 438 U.S. at 137, 98 S.Ct. at 2666 (quoting record on appeal), with the Terminal, it invited appellant to propose an addition to the Community House in the instant matter. Finally, we reject as unsupported appellant's argument that in Penn Central the property owner continued to enjoy valuable, transferable rights to develop the airspace above the Terminal, see 438 U.S. at 137, 98 S.Ct. at 2666, while the Church's development rights have little value. *See* Section 3(a) *infra.*[6]

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6. Appellant urges further that application of the Landmarks Law to the Church does not substantially advance a legitimate state interest. *See Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834–35, 107 S.Ct. 3141, 3146–47, 97 L.Ed.2d 677 (1987). While land use restrictions must be reviewed in the context of the individual property in question, *see Nectow v. City of Cambridge,* 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), the same government interest held to be valid in Penn Central—"preserving structures and areas with special historic, architectural or cultural significance," 438 U.S. at 129, 98 S.Ct. at 2662—is equally applicable here.

3. *Findings of the District Court*

The principal factual finding of the district court—one central to its rejection of the Church's free exercise and takings claims—was that the Church "failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities." *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 974–75 (S.D.N.Y. 1989)(opinion and order).

The Church claims that the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose. It further claims that it cannot afford to make the needed repairs and renovations to the Community House and Church building. It concludes that it must be allowed to replace the Community House with a revenue-generating office tower. The district court was unconvinced. It found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church. Appellant argues on appeal that these findings were clearly erroneous. Fed.R.Civ.P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 574–75, 105 S.Ct. 1504, 1511–12, 84 L.Ed.2d 518 (1985); *Sygma Photo News, Inc. v. High Society Magazine*, 778 F.2d 89, 95–96 (2d Cir. 1985). We disagree.

a. Adequacy of the Community House

The Church claims that the amount and configuration of usable space in the Community House is insufficient to accommodate the Church's various programs. It relies principally upon an analysis of space in the Community House by Walker Associates, an interior design firm hired by the Church. Presented to the Commission in three written reports and related oral testimony (collectively, "the Walker Report"), this study concluded that the demands for space by the Church's various programs exceeded the capacity of the Community House. Additionally, the Walker Report stated that renovation

or expansion was impractical due to the structural inflexibility of the building.

The district court discredited the Walker Report. With regard to space, there is no dispute that the Community House currently is too small. The Walker Report found that 8000 square feet of extra space is needed. The Commission placed the deficiency at about 4500 square feet.[7]

Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks Law. The Walker Report assumed that the Community House had an outmoded structure that precluded such an option. In fact, the building has a modern, light steel frame structure and was designed so that two additional floors could easily be added. Moreover, the Commission has indicated that it would be receptive to a proposal from the Church for such an addition. While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs,[8] it does offer a means of continuing those programs in the existing building. Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty–seven story office building.

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7. The Walker Report determined that the total space required in the Community House is 41,500 square feet, as against 33,500 square feet of available useable space. The Commission accepted the figure for requirements, but estimated the available useable space at approximately 37,000 square feet.

8. For instance, the existing building cannot readily accommodate the larger gymnasium or greater theater wing space sought by the Church.

b. Cost of Repair and Rehabilitation

The Church also argues that the necessary repairs to the physically deteriorating Church building and Community House would be prohibitively expensive. It relies on a study of the mechanical systems and exteriors of those buildings prepared by O'Brien, Krietzburg and Associates, a construction management firm, and submitted to the Commission through written reports and oral testimony (collectively, "the OKA Report"). The OKA Report estimated that it would cost approximately $11 million over two years to bring the buildings' mechanical, electrical, and plumbing systems into proper working order and to repair the buildings' exteriors.

The district court also rejected this conclusion, faulting the OKA Report for being biased in favor of replacement over rehabilitation, ignoring actual conditions at the property site, and using an inappropriate method of estimating costs. Further, the district court pointed to contradictory evidence presented to the Commission, both by persons opposing the proposed development and by neutral consultants. Based on this information, the court found $3 million "phased in over a period of several years" to be a reasonable estimate for repairs and replacement.

On appeal, the Church does not seriously defend the $11 million estimate contained in the OKA Report. Instead, it accepts the $3 million estimate for the work that it covers, but argues that this figure disregards certain "major elements of cost." In particular, the Church asserts that an additional $500,000 is necessary for life safety measures, $647,000 for repair of the church organ, and $360,000 for architectural and engineering fees. The City counters that the life safety additions would unnecessarily exceed building code requirements, that organ repair is not a proper expense for this proceeding, and that design fees would be negligible.

We need not rule on this dispute over approximately $1.5 million because it is not crucial to the district court's operative factual finding. As our discussion in the next section indicates,

even if the potential cost of repairs totaled $4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense. Thus, the district court's central finding that the Church had failed to prove that it cannot continue in its existing facilities does not hinge on whether any portion of this $1.5 million was excluded from its estimate of repair costs.

c. The Church's Finances

As a corollary to its claim that repair and rehabilitation of the Church building and Community House would be too costly, the Church argues that its financial condition does not allow it to make the necessary improvements and also continue its other programs. The district court, however, found that appellant had failed adequately to prove this assertion, a finding that is not clearly erroneous.

The Church has three primary sources of support and revenue: contributions in the form of pledges and offerings collected at worship services, income earned on investments, and fees charged for participation in activities conducted under its sponsorship. Investment income is derived from the Church's investment portfolio, known as the Consolidated Church Fund, the value of which stood at nearly $11 million at the end of 1984. The principal of this endowment consists of funds received as gifts or bequests. In addition, the Church's endowment includes a Properties Fund, representing resources in Church-owned property at acquired cost, net of depreciation, and a miscellaneous General Fund. Combined, these funds totaled just under $3.5 million at the end of 1984, giving the Church an overall endowment of about $14.3 million at that time. Over the decade preceding 1985, the Church's sources of revenue have sporadically kept pace with expenses, exceeding them in 1975, 1977, 1980, 1983 and 1984, and falling behind in 1976, 1978, 1979, 1981, and 1982. On the whole, the Church had only a slight net deficit over this period.

The Church's principal argument is that a major improvement expenditure of the type required to repair and

renovate the Church building and Community House would severely damage this "precarious" balance of revenues and expenses. Because such an expenditure would come from endowment funds, the Church contends, future investment income will inevitably decline as the result of a depleted portfolio. Such a decrease in future revenues, it concludes, will produce "severe deficits."

While a reduced principal will yield less investment income, the Church has not demonstrated that its budget cannot withstand building improvement expenditures under a reasonable financing procedure. For example, as the district court noted, withdrawals from the endowment might be made gradually to minimize lost investment income, or the Church might borrow against its endowment, and repay the loan over an extended period of time. Appellant has offered no financial projections or cash flow analyses to prove that these financing methods are not feasible. Without such data, the district court's finding that the Church failed to prove prospective financial hardship is not clearly erroneous.

We also cannot ignore the paucity of evidence offered by the Church to show that other forms of revenue are not available. Its claim that a capital fundraising drive already has been exhausted as a financing possibility is undercut by evidence that longtime members of the congregation cannot recall any such drive. Also, evidence before the Commission indicated that the transferable development rights for the airspace above the Church property are, contrary to the Church's claim, not worthless.

Finally, the Church argues that even if its endowment could withstand a building project, it is not at liberty to withdraw large sums for that purpose because of legal restrictions on the use of its investment funds. In particular, it urges that Section 717 of the New York Not-For-Profit Corporation Law prohibits the Church from expending the sums necessary to undergo a building project. That provision, however, does no more than impose upon the Church a fiduciary duty of care to

manage the congregation's money in a prudent and responsible fashion, *see* N.Y. Not–for–Profit Corp. Law §§ 513, 717 (McKinney Supp. 1990), and would be implicated only if the expenditures in question would unacceptably impair the Church's financial condition.[9]

4. *The Motion to Intervene*

The proposed intervenors argue that the district court should have granted their motion to intervene on the side of the defendants at trial. We may reverse the denial of a motion to intervene only for "abuse of discretion." *See United States v. Hooker Chemical & Plastics*, 749 F.2d 968, 990 (2d Cir. 1984). No such abuse is present here. The district court properly denied intervention as of right under Fed.R.Civ.P. 24(a)(2) because the proposed intervenors lack any legally protectable interest in this matter. Under New York law, as a Protestant Episcopal Church, St. Bartholomew's is a corporate body placed in the trusteeship of its church wardens and vestrymen. *See* New York Religious Corporation Law § 41 (McKinney Supp. 1990). To the extent that the proposed intervenors are members of the parish, they enjoy only the right to vote in the election of the church wardens and vestrymen. *See id.* § 43. Thus, the Rector, Wardens and Members of the Vestry is the proper party to litigate the constitutionality of encumbrances placed on Church property.

Nor did the district court abuse its discretion by denying permissive intervention under Rule 24(b). It was eminently reasonable to conclude that intervention only would complicate

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9. Although the Church also points to Section 513 of the Not–for–Profit Corporation Law, which deals with the administration of assets received for specific purposes, *see* N.Y. Not–for–Profit Corp. Law § 513 (McKinney Supp. 1990), it concedes that donor–imposed restrictions are not a "principal constraint" preventing the improvement of its property. It does not challenge the district court's finding that enough of the Church's funds are unrestricted so as to allow it to undertake a building project.

the litigation, and thereby "unduly delay ... the adjudication of the rights of the original parties." Fed.R.Civ.P. 24(b).

CONCLUSION

For the reasons stated above, we affirm both the judgment of the district court in favor of the defendants–appellees and the order of that court denying the motion to intervene.

The RECTOR, WARDENS, AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, Plaintiff,

v.

CITY OF NEW YORK, AND LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, Defendants.

No. 86 Civ. 2848 (JES).

United States District Court, S.D. New York.

Dec. 13, 1989.

As Amended Jan. 24, 1990.

728 F. Supp. 958

Church sued city Landmarks Preservation Commission, seeking determination that statute under which Commission had denied church's application of certificate of appropriateness to tear down activities building portion of designated landmark complex and replace it with high–rise office building which would be used in part for church activities, on grounds that statute violated church's First, Fifth and Fourteenth Amendment rights. The District Court, Sprizzo, J., held that: (1) statute did not violate free exercise clause; (2) statute did not involve government in excessive entanglement with affairs of church; (3) statute did not violate equal protection rights of church by imposing different standards for granting certificates in the cases of commercial and charitable entities; (4) statute did not deprive church of its procedural due process rights; and (5) statute was not unconstitutional as applied, as church failed to demonstrate that it could not use existing facilities, with affordable rehabilitation, to satisfy its religious needs.

Judgment for Commission.

Mudge, Rose, Guthrie, Alexander & Ferdon, New York City (Douglas M. Parker, Judah Gribetz, Howard W. Goldstein, George A. Pierce, of counsel), Henry P. Monaghan, Kent Greenawalt, James G. Glazebrook, Chancellor of St. Bartholomew's Church, New York City, for plaintiff.

Cadwalader, Wickersham & Taft, New York City (Donald G. Glascoff, Jr., Joseph Polizzotto, Lisa J. Sotto, of counsel), for amicus curiae in support of plaintiff (New York State Interfaith Commission on Landmarking of Religious Property).

Cusack & Stiles, New York City (George J. McCormack, of counsel), for amici curiae in support of plaintiff (Roman Catholic Archdiocese of New York).

Hurley, Kearney & Lane, Brooklyn, N.Y. (Kevin M. Kearney, of counsel), for amici curiae in support of plaintiff (Roman Catholic Archdiocese of Brooklyn).

Jeffrey R. Notarbartolo, Brooklyn, N.Y., for amicus curiae in support of plaintiff (Committee of Denominational Executives).

Peter L. Zimroth, Corp. Counsel of the City of New York, New York City (Jonathan L. Pines, Lucy A. Cardwell, Asst. Corp. Counsels, of counsel), for defendants.

Simpson, Thacher & Bartlett, New York City (John J. Kerr, David W. Sussman, Elizabeth P. Johnson, of counsel), for amici curiae in support of defendants (The New York Landmarks Conservancy, Nat. Trust for Historic Preservation, Nat. Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of N.Y. State, and Women's City Club of New York, Inc.).

Mannarino Bader Bloom Fischer & Woll, P.C., New York City (Gerald D. Fischer, of counsel), for amicus curiae in support of defendants (Committee to Oppose the Sale of St. Bartholomew's Church, Inc.).

John Sexton, Norman Dorsen, New York City, for amicus curiae in support of defendants.

Cahill Gordon & Reindel, New York City (William E. Hegarty, Howard G. Sloane, David F. Freedman, of counsel), for amici curiae in support of defendants (The New York Landmarks Conservancy, National Trust for Historic Preservation, National Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc.).

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiff, the Rector, Wardens and Members of the Vestry of St. Bartholomew's Church bring this action pursuant to 42 U.S.C. § 1983, for declaratory and injunctive relief and for damages. Plaintiff contends that defendants, City of New York and the Landmarks Preservation Commission of the City of New York ("Commission"), have violated its rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and under the laws of the State of New York. The Court has, by agreement of the parties, held a bench trial on the evidence previously submitted to the Commission in 1985 and 1986. After reviewing that evidence de novo and considering the law applicable thereto, the Court makes the following findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a)[10]

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10. The parties have set forth the evidence submitted to the Commission in the form of a twenty-three volume appendix ("App."). References to that evi-

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized under the laws of the State of New York as a non–profit religious corporation. The Church building, designed by Bertram Goodhue, was completed in 1919, and is located on the east side of Park Avenue between East 50th and East 51st Streets in the City of New York. *See* 8 App. 2540; 10 App. 3432. Next to the church building is a seven floor community house constructed by Goodhue's successor firm during the years 1926–28. *See* 8 App. 2540, 10 App. 3433; 11 App. 4062. The community house provides, in combination with the church building, a home for a variety of social and religious activities in which the Church is engaged.[11] In addition to the two structures, the Church's Park Avenue property is improved by a garden and terrace area. *See* 11 App. 4062.

In March of 1967, the church, the exterior of the community house and the surrounding property were designated as landmarks by the Commission, a designation plaintiff did not then oppose.[12] *See* 8 App. 2540. Subsequently, however, plaintiff filed two applications with the Commission seeking a Certificate of Appropriateness under what is now N.Y. City Admin.Code § 25–307.[13] The first such application, filed in

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dence in this Opinion are to the volume and page number of that appendix, *e.g.*, 1 App. 246 refers to appendix volume one at page 246.

11. Among other things, the community house provides athletic facilities, including a pool and basketball court, a theatre, a pre–school for sixty students, meeting rooms, kitchen and dining facilities and office space. The church building, in conjunction with the community house, provides clothing, meals and sleeping quarters for the homeless. *See* 10 App. 3433–35.

12. The Church's ability to alter or demolish the buildings is restricted by a landmark designation. Any such alteration requires the approval of the Commission. *See* N.Y.Admin.Code § 25–305(a)(1).

13. Section 307(a) provides in relevant part: "the commission shall determine whether the proposed work would be appropriate for and consistent with the

December 1983, sought permission to tear down the community house and erect in its place a fifty–nine story office tower. *See* Affidavit of Gene Norman ("Norman Aff.") at ¶ 21. This application was denied as an inappropriate alteration on June 21, 1984. *See id.* at ¶ 25. The second application, filed in December 1984, sought to demolish the community house in favor of a forty–seven story office tower. *See id.* at ¶ 27; 8 App. 2470. This application was also denied as inappropriate on August 26, 1985. *See* Norman Aff. at ¶ 29. After the denial of plaintiff's second application, a further application to build the forty–seven story tower was made on September 3, 1985, on grounds of insufficient return pursuant to sections 207–4.0 and 207–8.0 of the New York City Administrative Code.[14] *See* 10 App. 3234.

The Commission held public hearings on plaintiff's third application on October 29, 1985, December 3, 1985, and January 21, 1986. *See* 2 App. 321; 3 App. 704; 4 App. 1114. At those hearings the Commission heard testimony from all interested parties, including expert witnesses who testified regarding the suitability of the community house to its charitable purpose, the extent and cost of necessary structural and mechanical repairs for both the church and community house, and the state of the Church's finances. In addition, the

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effectuation of the purposes of this chapter."

14. Section 207–8.0(a)(2)(c), now found at § 25–309(a)(2)(c), provides that a certificate of appropriateness on the ground of insufficient return shall be granted when the applicant shows, inter alia, that: "such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes." In addition, New York law requires that a certificate of appropriateness be granted where failure to do so would "prevent or seriously interfere" with the applicant's ability to carry out its charitable purpose. *See Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454–55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974).

Commission received many reports from the testifying experts and other submissions. After the close of the last public hearing, the Commission met in Executive Session, open to the public, on February 6, 11, 18, 20, and 24, 1986 to discuss plaintiff's application, to accept further submissions from interested parties, and to take testimony and reports from the Commission's own pro bono consultants. *See* 5 App. 537, 1638; 6 App. 1803, 1914; 7 App. 2117. After considering all of the evidence submitted, the Commission voted on February 25, 1986, to deny plaintiff's application. *See* Norman Aff. at ¶ 67. On October 10, 1986, the Commission issued its written determination denying the application. *See id.* at ¶ 68; 19 App. 6448.

Thereafter, plaintiff brought the instant action alleging the following constitutional claims: 1) that the landmark laws are facially unconstitutional to the extent they impact the property of any church because they interfere with the free exercise of religion in violation of the First Amendment; 2) that the landmark laws are facially unconstitutional because they treat charitable and commercial institutions differently in violation of the equal protection clause of the Fourteenth Amendment; 3) that the landmark laws are unconstitutional as applied to St. Bartholomew's as a consequence of the Commission's denial of their applications for a certificate of appropriateness, because that denial interfered with the free exercise of religion and because the denials constitute a taking of property without compensation; 4) that the landmark laws both facially and as applied to St. Bartholomew's violate the establishment clause by requiring an intrusive examination of the church's internal affairs in the hardship application process; 5) that the landmark laws both facially and as applied violate the doctrine of substantive due process by depriving the Church of its property's reasonable income production without a compelling state interest; 6) that the legal standards for designation of a landmark and for granting a certificate of appropriateness are impermissibly vague in violation of the due process clause of the Fourteenth Amendment; 7) that the lack of cross–examination of witnesses

in the certificate of appropriateness procedure, the vagueness of the Commission's first two denial letters, the Commission's failure to consider economic hardship in the second application and the Commission's failure to allow plaintiff to submit responses to the Commission's witnesses all constitute due process violations. In addition, plaintiff brought state law claims for Article 78 relief alleging that the Church should have been granted a certificate of appropriateness under New York law.[15]

Plaintiff then moved for partial summary judgment on its claims of facial unconstitutionality, and defendant cross–moved for summary judgment.[16] These motions were later supplemented to add the issue of whether plaintiff's Article 78 claims were justiciable in a federal forum. The Court ruled on these motions in open court. Those rulings are recapitulated below in section I.[17]

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15. Plaintiff could have sought review of the Commission's factual and legal determinations in an Article 78 proceeding in New York State Supreme Court but elected not to do so. *See* N.Y.Civ.Prac. L.& R. § 7801 (McKinney 1981).

16. In addition to moving for summary judgment on plaintiff's claims of facial unconstitutionality defendants asserted that plaintiff's as applied claims were insufficient as well because plaintiff still retained some viable economic use of its property.

17. In addition to the summary judgment motions in this case, a motion to intervene on the side of the defendants was made by the Committee to Oppose the Sale of St. Bartholomew's ("Committee"), a group of church members opposed to the development project. The Court determined that intervention as of right was not appropriate because the members of the Committee had no ownership interest in the Church property itself, but at best only had the right to vote on the development issue in an intra–church proceeding. The Court also denied permissive intervention as a matter of discretion because, quite aside from the jurisdictional problems caused by such intervention, that intervention would have seriously interfered with the parties' desire to expeditiously resolve the constitutional claims raised on the administrative record, and might well have led to collateralization of the issues and further discovery. *See infra* Discussion at II. In addition, the Court was persuaded that affording amicus curiae status to the putative intervenors provided an adequate substitute for

DISCUSSION

I. Plaintiff's Claims of Facial Unconstitutionality

A. First Amendment Claims

The Court rejects plaintiff's contention that the landmark laws unconstitutionally interfere with the free exercise of the religious beliefs of any church that is designated a landmark. The gravamen of plaintiff's free exercise claim is that by restricting a church's ability to use its property as it wishes in support of its religious or charitable mission, the landmark laws impermissibly burden the exercise of religious belief.

That claim lacks merit. A statute abridges the free exercise of religion when it coerces the affected individuals into violating their religious beliefs or when "[it] penalize[s] religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 449, 108 S.Ct. 1319, 1325, 99 L.Ed.2d 534 (1988); *see also Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303, 105 S.Ct. 1953, 1962, 85 L.Ed.2d 278 (1985); *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1792, 10 L.Ed.2d 965 (1963). A substantial interference with the free exercise of religion may also occur where church property is taken, even by condemnation, for state purposes. Cf. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 871 (2d Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989).

However, the mere possibility that a church may at some time want to make a different use of its landmarked property creates no more than an incidental burden on the practice of religion that does not "require the state to come forward with a compelling reason justifying its actions." *See Yonkers, supra,*

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permissive intervention.

858 F.2d at 871. Therefore, the designation of church buildings as landmarks does not in and of itself violate the free exercise clause.[18] This is especially true since the landmark designation does not deprive the Church of the right to seek a certificate of appropriateness to alter its property if the nature of that property is such that it no longer can be used to carry out its religious or charitable mission.

Plaintiff also contends that because the New York statutory and judicial tests for determining when a certificate of appropriateness may be granted on the grounds of hardship require an intrusive examination into the finances and internal workings of the Church, those tests, both on their face and as applied to St. Bartholomew's, result in an excessive entanglement between government and religion in violation of the establishment clause. While the establishment clause does prohibit excessive entanglement between government and religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 619, 91 S.Ct. 2105, 2114, 29 L.Ed.2d 745 (1971), that doctrine has normally been applied in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that government financing is being used solely for secular purposes. *See id.*; *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 90, 502–03, 99 S.Ct. 1313, 1319–20, 59 L.Ed.2d 533 (1979). That doctrine has no applicability where, as here, the government must make an inquiry into church finances for the limited purpose of determining the validity of a church's claim of financial hardship.

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18. The Court also rejects plaintiff's contention that whenever a law has any impact upon a religious institution it must be justified by a compelling state interest. A compelling state interest is only required when the law impermissibly burdens the free exercise of religion. *See Yonkers, supra*, 858 F.2d at 871. Absent such a burden the state need only show a rational basis for the legislation. The New York landmark laws have such a rational basis. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129, 98 S.Ct. 2646, 2661, 57 L.Ed.2d 631 (1978). Thus, plaintiff's substantive due process claims are without merit as well.

B. Equal Protection Claims

Plaintiff alleges that because the landmark laws provide different hardship tests for commercial and charitable entities including religious institutions, they violate the equal protection clause. Because the Court has already found that the laws do not on their face impermissibly bu[r]den religion, any differences in treatment need only be justified by a rational basis.[19]

As a threshold matter it should be noted that the equal protection clause only protects persons who are similarly situated from disparate treatment. Therefore, the differences between commercial entities and charitable institutions render that argument dubious at best. In any event, those differences clearly provide the state with a rational basis for treating those entities differently.

Since the hardship test for commercial enterprises is based upon the ability to earn a reasonable return from its property, it is obvious that a similar standard could not be applied to an entity which exists for charitable and not commercial purposes.[20] Indeed, it would make little sense, and might in fact be irrational, to apply the charitable test to a commercial property or the commercial test to a charitable property. It follows that the so called disparity in treatment is nothing more than a reasonable effort by the state to afford hardship relief to both classes of entities based upon criteria specifically tailored to the nature of each.

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19. Plaintiff also argues that its equal protection rights have been violated because the landmark laws treat landmarked and non-landmarked churches differently. This argument is at best an attack upon the general rationality of the landmark laws, an attack foreclosed by *Penn Central*, *supra*.

20. N.Y. City Admin.Code § 207-8.0(a)(1)(a), now § 25-309(a)(1)(a), permits commercial property to obtain a certificate of appropriateness on the ground of insufficient return if, inter alia, the landmarked building "is not capable of earning a reasonable return."

C. Due Process Claims

Plaintiff also argues that the legal standards for designating a landmark and for granting a certificate of appropriateness are impermissibly vague and give the Commission virtually unfettered discretion in making its decisions. Therefore plaintiff argues the laws do not comport with the minimum requirements of procedural due process.

At the very least, due process requires notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). The landmark laws unquestionably meet that standard in that they provide a property owner with adequate notice of the law's requirements and with the opportunity for an extensive hearing, especially in view of the interpretation placed upon those laws by the courts of New York. *See, e.g., Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454–55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974). It follows that since a reasonable person can and should know what standards must be met in bringing an application for a certificate of appropriateness or in opposing a landmark designation, those statutes are not impermissibly vague. *See Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988).

While it is true that the procedures available at a landmark hearing are not the same as those available at a civil trial, that is not what due process requires. *See Mathews, supra*, 424 U.S. at 333, 96 S.Ct. at 901. Moreover, under New York law there is a right to judicial review of Commission decisions in the state court system, *see supra* note 6, a circumstance that further supports the rejection of plaintiff's due process claims.[21] *See*

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21. There is no need to resolve the merits of plaintiff's contention that the Commission violated its procedural due process rights during the hardship hearing. Those alleged defects could have, and should have, been addressed

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 & n. 14, 105 S.Ct. 3108, 3120–21 & n. 14, 87 L.Ed.2d 126 (1985).

In sum, the Court rejects plaintiff's contentions that the landmark laws are unconstitutional on their face as to all churches, and grants summary judgment for defendants as to those claims.

II. The Trial of this Action

Although concluding that partial summary judgment should be granted for defendants on plaintiff's claims of facial unconstitutionality, the Court held a trial with respect to plaintiff's claim that the landmark laws were unconstitutional as applied. Plaintiff's contentions in that regard are twofold: (1) that because it could no longer carry out its religious mission in its existing facilities the denial of its hardship application constituted a taking of its property without just compensation; and (2) the denial of that application constituted an impermissible burden on the exercise of its religious beliefs.

Initially, the Court was of the view that it could have a trial de novo and consider facts not before the Commission in deciding whether the landmark laws had been unconstitutionally applied to plaintiff. Subsequently, the Court reconsidered this view and concluded that it would be inappropriate to predicate a

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through an Article 78 proceeding in state supreme court. Moreover, plaintiff has expressly disclaimed any desire to have the matter returned to the landmark commission for a new hearing, which is the only relief that would be appropriate even if the Court were to accept plaintiff's argument that this hearing, as opposed to the standard applicable to such proceedings in general, deprived the church of procedural due process. In view of that circumstance, the Court will treat that claim as abandoned. For the same reason, the Court will not decide the merits of whether Article 78 relief can constitute a claim cognizable in a federal court, an issue that has caused some difficulty. *Compare Cooney v. American Horse Shows Ass'n*, 495 F. Supp. 424, 433 n. 7 (S.D.N.Y. 1980) with *Herrmann v. Brooklyn Law School*, 432 F. Supp. 236, 239–40 (E.D.N.Y. 1976).

finding of unconstitutionality on facts which the Commission never had an opportunity to consider, especially since under the statutory scheme, a new application for hardship exemption can be made at any time based upon additional facts.[22] Therefore, the Court, as requested and consented to by the parties,[23] will evaluate this claim solely on the basis of the record before the Commission.[24] However, since the Court is presented with a

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22. Indeed, it would hardly be consistent with the principles of comity and federalism that require a federal court to abstain where a remedy may be provided by state law without reaching the constitutional issues, *see Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500–501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941), for this Court to deprive the Commission of the opportunity conferred upon it by state law to determine whether new facts support plaintiff's hardship application as a matter of state law.

23. The putative intervenors did not either request or consent to that procedure.

24. Defendants contend that under *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the Court must not only confine itself to the administrative record, but must also give preclusive effect to the factual findings of the Commission. *Elliot* requires that when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the courts of that state. *See id.* at 798–99, 106 S.Ct. at 3225–26.

However, whether a proceeding is to be regarded as judicial for purposes of Elliot preclusion is a question of federal law. Moreover, the fact that a proceeding may meet the minimum requirements of due process does not necessarily require that it be afforded preclusive effect. In addition, state law must require that the proceeding be afforded preclusive effect before the federal issue need even be reached. The Court is unpersuaded that, as a matter of federal law, landmark proceedings should be regarded as quasi-judicial in nature. Indeed, they are more akin to town meetings than judicial proceedings, in that all may be heard regardless of the relevance of their testimony, evidentiary rules do not apply, and questioning by the attorneys for the interested parties is not permitted.

In any event, it does not appear that New York law would require that a decision of the Commission be given preclusive effect. Under New York

claim of constitutional deprivation, it must make a de novo review of that evidence.[25]

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law, a proceeding is quasi–judicial and therefore entitled to preclusive effect if the agency is authorized to act in an adjudicatory fashion, the procedures it employs are sufficient to permit confidence that the facts and issues were fully tested, and the parties reasonably expected to be permanently bound by the result reached. *See Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276–77, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 785, 102 L.Ed.2d 777 (1989). Where, however, an agency makes findings based upon conditions which are subject to change and further review, New York is not likely to give those proceedings preclusive effect. *See id.* An application for a certificate of appropriateness based on hardship appears to be such a proceeding. There is no limit on the number of applications which may be made, and an applicant's economic condition, which is likely to change over time, will affect the likelihood of success of the application. Thus, an application once denied may be pursued again with a different result at a future date.

Moreover, in a case decided by the New York Court of Appeals prior to the *Elliot* decision, that court found that Landmark designation hearings are not quasi–judicial for purposes of determining what type of Article 78 review they will receive. *See Lutheran Church in America, supra*, 35 N.Y.2d at 128 n. 2, 316 N.E.2d at 309 n. 2, 359 N.Y.S.2d at 13 n. 2. The Court based that holding upon the fact that designation proceedings are not adversary hearings involving cross–examination. *See id.* Certificate of appropriateness hearings share these characteristics.

25. It is, of course, plaintiff's burden to prove by a preponderance of the evidence that its constitutional rights have been violated on the basis of that record, even though some of the evidence at the hearing may not have been admissible at a federal civil trial.

III. Plaintiff's Unconstitutional As Applied Claims

A. Just Compensation Claims

Plaintiff's claim of unconstitutionality as applied depends upon plaintiff's ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to expend the sums necessary to make those facilities adequate. It is that circumstance that underlies plaintiff's contention that the denial of its hardship application deprived it of its property without just compensation in violation of the Fifth Amendment and abridged its right to freely exercise its religious belief in violation of the First Amendment.

At the outset it should be noted that the Supreme Court has never passed upon the constitutionality of a regulation, such as the landmark laws, as applied to the property of a charitable or religious institution. However, in dealing with commercial property, the Supreme Court has recognized that there is no magic formula for determining when a taking has occurred. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123–24, 98 S.Ct. 2646, 2658–59, 57 L.Ed.2d 631 (1978). Factors of particular significance, however, are the economic impact of the government action, i.e., its interference with legitimate investment expectations, and the character of the government action, *e.g.*, is the action a physical taking or a land use regulation. *See id.* at 124, 98 S.Ct. at 2659. These factors must be evaluated in light of the overriding rule that the Fifth Amendment contemplates continued use of a property as it was used in the past, and thus permits no substantial interference with the property owner's primary investment expectations or reasonable beneficial use. *See id.* at 136, 98 S.Ct. at 2665.

While the concept of legitimate investment expectation is not directly transferable to a charitable or religious institution, the concepts of reasonable beneficial use and the owner's primary expectations are equally applicable to both. Moreover,

the New York Courts have developed a takings standard for charitable institutions embodying these concepts that is a constitutionally acceptable standard for determining when there has been a taking of charitable property, i.e., where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution. *See Society for Ethical Culture, supra,* 51 N.Y.2d at 454–55, 415 N.E.2d at 925, 434 N.Y.S.2d at 935; *Lutheran Church in America, supra,* 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16. Therefore, the Court adopts this test to determine whether plaintiff's Fifth Amendment rights were violated as a consequence of the denial of its hardship application.

B. Free Exercise Claim

Assuming arguendo that plaintiff's charitable work is the exercise of religion for First Amendment purposes, plaintiff must prove that it can no longer carry out this work in its existing facilities to sustain its free exercise claim. *See Lyng, supra,* 108 S.Ct. at 1326; *Yonkers, supra,* 858 F.2d at 871–72. Thus, in this case, the First Amendment inquiry is identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities.

The Court has examined the record before the Commission in an effort to determine if plaintiff has proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. For the reasons that follow, the Court finds that plaintiff has failed to carry that burden, and that judgment must be entered for the defendant.

C. Findings of Fact

Plaintiff contends that the community house is an inadequate structure for carrying out the Church's religious mission and charitable purpose. Plaintiff further alleges that both the community house and the church are in an advanced state of disrepair and cannot be rehabilitated for less than $11 million.

Thus, plaintiff argues it can only rehabilitate the Church and carry out its charitable purpose if it is allowed to demolish the community house, build the office tower in its place, and reap the revenues therefrom. Finally, plaintiff contends that its finances are in such a deplorable state that even if the two buildings could be rehabilitated for less than $11 million, it cannot afford to spend more than a minimal sum upon such work. The Court will address each of these contentions in turn.

1. *Adequacy of Community House Space*

Plaintiff's first factual contention concerns the amount of the space contained in the community house, and the configuration of that space in relation to the needs of the Church's programs. Plaintiff contends that the evidence shows that: the usable space available in the community house is insufficient to accommodate the variety of activities that compete for the space; that it wishes to expand its existing programs but cannot do so given those space constraints; that it is forced to conduct activities in spaces that are inappropriate for those activities;[26] and that renovation of the interior of the community house is impractical and not feasible.

Plaintiff relies primarily upon an analysis of the use and configuration of the community house space undertaken at plaintiff's request by Walker Associates, an interior design firm. In addition to the testimony of its president, Keith Keppler, *see* 2 App. 462; 15 App. 5275, Walker submitted three reports to the Commission, *see* 10 App. 3429; 14 App. 4843; 16

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26. A focal point of plaintiff's contention in this regard is its claim that it is forced to carry out its feeding program for the homeless from the church mortuary chapel, and thus must carry food from the community house kitchen downstairs and the length of an entire city block to reach the church. In addition, the Church contends that it cannot continue to provide shelter for the homeless in the church narthex because that space is inappropriate, and because it can only provide shelter for ten persons per night in that area. *See* 2 App. 380, 382–85.

App. 5586. In those reports and testimony, Walker concluded that the community house is not adequate, suitable or appropriate for the purposes to which it is devoted. *See* 10 App. 3431–32. Walker found that the community house lacked sufficient usable space, that the existing usable space was inefficiently designed and poorly distributed, and that the multiplicity of uses of that space created scheduling conflicts.[27] *See id.*

In addition, Walker concluded that the building's structure was outmoded and inflexible, and that renovation of the structure's interior was impractical and prohibitively expensive due to the massive structural systems within the building, the elevator shafts and support structures, and the impossibility of demolishing thick load bearing walls. *See id.* at 3432. In sum, Walker found that the Church could only continue to successfully carry out its charitable and social activities by moving to another more suitable facility, and that the proposed forty–seven story office tower was such a facility. *See* 4 App. 1321–22; 10 App. 3432.

However, the Court, based upon flaws in Walker's methodology and upon conflicting evidence, finds that Walker's conclusions are incorrect, and that plaintiff has failed to prove by a preponderance of the evidence that the community house is unsuitable for its current use.

The credibility and accuracy of Walker's findings are undercut by several factors. First, it is clear that Walker did not attempt to examine the building plans of the community house before it determined that the building could not be easily altered. *See* 3 App. 916. If it had done so, it would have found that in fact the building does not contain massive load bearing walls, but instead is a light steel frame structure that is easily

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27. Specifically, Walker found that the community house contained a net usable area of approximately 38,000 sq. ft., that the Church programs required a usable area of approximately 46,000 sq. ft., leaving a space deficit of approximately 8,000 sq. ft. *See* 2 App. 492.

susceptible to alteration.[28] *See* 4 App. 1240; 16 App. 5721–22. Second, Walker based its finding of inadequate usable space upon calculations appropriate to a commercial office building, the area of Walker's expertise, and not upon calculations appropriate to plaintiff's facility. *See* 6 App. 1956; 7 App. 2186. Third, measuring the adequacy of space in an existing building was an unusual task for Walker, which was used to projecting space for designs of proposed buildings.

In addition, Walker conducted its study by asking questions of the heads of each program using the facility, and, unsurprisingly, found that each program head thought he or she needed more space. *See* 14 App. 4853. Moreover, examination of the questionnaires used reveals that they fail to distinguish between program needs and mere desires for expansion. Furthermore, Walker presented no evidence of objective observations of how the facility is actually used over time. The Court finds therefore that Walker's conclusions are without adequate factual support.

Moreover, other evidence demonstrates that the community house is adequate for the purposes to which it is devoted. Weekly building activity schedules, if anything, supported the conclusion that the community house's space was in fact underutilized, that many of the rooms were not used at all during the day, or were used by very few, and that no scheduling conflicts were apparent. *See* 12 App. 4431–33; 13 App. 4736.[29] In fact, the Church was able to rent out some of its space to area businesses, and has formed a special committee to increase those rentals. *See* 13 App. 4733–34. Moreover, although plaintiff

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28. For this reason, and because it was unsupported by any evidence, the Court also rejects Walker's contention that interior renovation of the community house would cost approximately $3.4 million.

29. Testimony also indicated that Church membership, and membership in the community club, a primary user of the community house, has been steadily declining. *See* 12 App. 4389–91.

complained that it could accommodate only sixty pupils in its preschool, it has an occupancy permit for one hundred pupils, and therefore underutilizes the capacity of even its preschool facilities. *See* 7 App. 2223; 15 App. 5786.

Walker's conclusion that the community house is inefficiently configured is belied by the fact that it failed to consider inexpensive methods of reconfiguring large rooms, for example, by installing removable room partitions. Finally, the Commission's own calculations reveal that even accepting Walker's estimate of the space needed to conduct current activities, the community house's space deficiency was much lower than Walker's estimate, and that any deficiency could be made up at relatively low cost by utilizing the basement as a storage area. *See* 17 App. 5800.

The credibility of plaintiff's evidence is further undercut by the fact that its proposed new building, which reverses the proportion of space above and below ground in the existing facility, would be only marginally better, if at all, in terms of usable space, *see* 3 App. 893–94, and significantly inferior in many other respects such as the quality of the below ground environment, the choked single access point of the office building lobby,[30] and the absence of any plan to encompass the ministry to the homeless in the new structure, which oddly enough is a program that plaintiff asserts it does not have adequate space for in the present structure.[31] *See* 7 App. 2201–10. In sum, plaintiff's reliance upon the Walker report and the Court's

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30. Plaintiff complained that the community house's two entrances, providing access space of 700 sq. ft., are inadequate, but the proposed building has a single access point with an area of 450 sq. ft., and must be shared with the rest of the occupants of the forty-seven story tower. *See* 7 App. 2201.

31. In addition, plaintiff has failed to show why the existing community house dining facilities, or even the auditorium, could not replace the church mortuary chapel as the site of the breakfast feeding program for the homeless. Both of those facilities are much closer to the kitchen and are never used in the morning.

rejection of that report supports the conclusion that plaintiff has failed to show by a preponderance of the evidence that the community house is an inadequate structure for conducting its activities.[32]

2. *Required Exterior and Mechanical Repairs*

Plaintiff's second major factual contention is that the community house and the church building both require a complete overhaul and replacement of existing mechanical systems, and substantial repair and replacement of exterior structural systems at a cost of approximately $11 million. Plaintiff's sole support for this proposition is a study of the mechanical systems and the building exteriors undertaken in 1985 by O'Brien, Krietzburg and Associates ("OKA"), a firm of professional construction managers, submitted through two reports, *see* 10 App. 3281; 14 App. 4951, and the testimony of OKA's president, James O'Brien, *see* 2 App. 413; 4 App. 1205, 1341. In formulating its recommendations, OKA relied upon the report of Edwards & Zuck, P.C., who evaluated the plumbing, mechanical and electrical systems, *see* 10 App. 3367, the report of Caine, Farrell & Bell, architects, who examined the exteriors, *see id.* at 3388, and the report of Barr & Barr, Inc., builders, who provided cost estimates of the repairs. *See id.* at 3396.

Based upon these three reports, OKA concluded that poor maintenance programs in the past have caused the overall exterior physical condition of the buildings to seriously

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32. In fact, the Church did not commission the Walker space study until the Spring of 1985, long after plans for the new building had been drawn. *See* 4 App. 1307. This fact supports the view that the Church's claim that the building is inadequate was an afterthought designed to provide another argument for demolishing the building after its first two attempts to get the proposed construction approved had failed. This point was aptly made by Commissioner Halsband: "in this case the new building was made in the absence of a program—the program was done last—and that whole intermediate step of comparing what you've got to what you need seems to never to [sic] have been expressed...." 6 App. 1936.

deteriorate, and that the buildings' mechanical systems were outdated and in some cases inoperative. *See id.* at 3286–87. OKA's prescription for these ills involves virtually complete replacement of mechanical, electrical and plumbing systems and significant replacement of exterior elements. *See id.* at 3298–3366. Rehabilitation of existing systems was not considered. The total cost of these repairs and replacements was estimated by OKA to be $11,663,500, on the assumption that construction was to be completed within two years. *See* 14 App. 4956–63.

The Court does not find OKA's assessment persuasive for the following reasons. First, it is clear from the testimony of Ronald Alexander, a former vestryman in charge of the Church's building committee, that OKA was told to maximize the cost of estimates to the greatest defensible extent, and that OKA undertook to do just that by advocating replacement over rehabilitation wherever possible. *See* 3 App. 724. Moreover, OKA admitted a bias in favor of replacement,[33] and indeed had little experience in rehabilitating older buildings. In addition, OKA did not rely on a full set of plans and specifications in evaluating necessary repairs. *See* 4 App. 1367–68. Instead, OKA relied solely on the reports of other firms who were not called to testify before the Commission.

These reasons would be a sufficient basis to reject OKA's conclusions. There is, however, ample additional evidence to show that not only did OKA grossly overestimate the amount of work required, but that its method for allocating costs to that work is seriously flawed. For example, OKA recommended wholesale replacement of the church's front steps and the blue stone steps leading from Park Avenue to the terrace. *See* 10 App. 3312. However, other evidence showed that only the top platform of the church steps and one of the blue stone steps

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33. For example, Mr. O'Brien stated that in his view he would "come in and gut the whole thing, because there was nothing worth saving." 4 App. 1349.

required replacement. *See* 5 App. 1641. Similarly, OKA advocated replacement of all of the sidewalk when only part of the sidewalk was cracked and in need of repair.

In estimating the required roof repairs, OKA ignored the fact that individual tiles could be reused in repairing the tile roofs, *see* 5 App. 1681–82, and that several of the flat roofs had been recently replaced and thus did not need to be replaced again. *See* 5 App. 1687; 13 App. 4656–57. All of these facts tend to show that the OKA report was not based upon careful examination and consideration of what repairs were truly necessary, but instead upon the presumption that all problems should be solved by complete replacement. *See* 12 App. 4632. Thus, the Court finds OKA's evaluation of necessary exterior repairs incredible and unpersuasive.

Similar flaws are apparent in OKA's evaluation of necessary repairs to the buildings' interior mechanical systems. Since OKA claimed to rely on Edwards & Zuck, it is especially pertinent to note that OKA in fact departed from the recommendations of that report. For example, while Edwards & Zuck recommended retaining and modifying existing ductwork in the community house, *see* 10 App. 3371, OKA estimated that most of the ductwork had to be replaced. *See id.* at 3349–50.

This selective reliance on Edwards & Zuck supports the inference, absent some other basis for the estimate, that OKA was guessing at what repairs were truly necessary. This inference is supported by other OKA estimates as well. For example, OKA advocated wholesale replacement of the electrical systems, ignoring the fact that much of that work had already been accomplished. *See* 6 App. 2033; 10 App. 3361–62. Indeed, OKA did not even know that there were no outstanding fire code violations, and therefore made recommendations which incorrectly assumed that the auditorium balcony and the church basement had not been brought up to fire code standards. *See* 10 App. 3308–11. Similarly, OKA's sprinkler system estimate ignored areas of the community house that already had sprinkler

systems, and included costs for a sprinkler system based upon a square footage estimate for the entire building.

Moreover, OKA's report evidenced a total lack of familiarity with what could be accomplished by retaining and refurbishing existing mechanical systems. Rather than undertaking a detailed analysis of the plumbing, electrical and heating ventilation and air conditioning systems to determine what could be salvaged, OKA simply opted to replace it all. In so doing OKA ignored, for example, the advantages to be gained by retaining the direct current electrical systems, and the virtually unlimited service life of older properly maintained equipment. *See* 16 App. 5749.

In sum, it is clear from OKA's report that their object was not to determine what repairs were truly necessary or required, but to maximize the amount of work and the cost of that work. There is simply no other explanation, and none has been offered, for OKA's wholesale reliance upon replacement and complete rejection of rehabilitation, especially since there is abundant evidence that many of the systems examined could in fact be rehabilitated.

Quite aside from the defects in OKA's analysis noted above, OKA's method of estimating costs is highly questionable. In estimating costs, OKA relied first upon the cost estimates of Barr & Barr, and second upon its own comparison of the Barr & Barr estimate to those contained in R.S. Means Co., Means Cost Data (1985 ed.), a standard reference work for construction cost estimates. *See* 14 App. 4955. The Means handbook provides cost estimates for a given type of work, *e.g.*, electrical system replacement, on a per square foot of building space basis. *See id.*

While this may be an acceptable method of estimating costs for new construction where there is no existing structure, it is not, as several experts testified, either an appropriate or accurate method of estimating costs in an existing facility because the square foot method fails to account for elements in the

existing structure that can be used and adapted to fit in with the rehabilitative work. *See* 3 App. 849, 879, 910, 923; 6 App. 2035. Thus, cost estimates based on a square foot calculation are likely to overstate the actual cost of repair and rehabilitation, or for that matter, replacement.[34]

OKA's estimates are also suspect because they are based not upon first hand examination of the facilities, but upon Barr & Barr's estimates, and Barr & Barr was never called to testify before the Commission to explain their calculations. In addition, the Court finds that OKA overstated its costs by including a 1.67 multiplier for interior work on a landmark when the interior of the community house is not landmarked. *See id.* at 2002. Similarly, OKA included a twelve percent addition for architectural and engineering fees that is not only well above the industry average for such fees, see 13 App. 4624, but also applied that fee to types of work that do not normally require such expertise. *See* 6 App. 2003.[35]

3. *The Contradictory Evidence*

It should also be noted that substantial evidence contradicting OKA's findings was submitted by the Committee to Oppose the Sale of St. Bartholomew's Church ("Committee to Oppose"), *see* Report of John Altieri, 13 App. 4656; Report of Robert Silman Assoc., P.C., 7 App. 2182, 13 App. 4628, 16

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34. One witness testified that OKA's cost estimates were as much as three times too high. *See* 6 App. 2003.

35. The Court also finds OKA's insistence on compressing the work into a two year period to be unreasonable. While this recommendation obviously serves to magnify the financial hardship to the Church by requiring large expenditures in a short period of time, it would also require, in all likelihood, severely restricting the use of the facilities to accomplish major repairs. In addition, the recommendation ignores fiscal reality as well. A more reasonable approach, and the one used by other organizations, would be to do the most essential work first, and spread the expenditures out over a longer period of time.

App. 5721; Report of the Ehrenkrantz Group, P.C., 13 App. 4632; Report of James Stewart Polshek and Partners, 13 App. 4620, 16 App. 5709, and by the Commission's own pro bono consultants. *See* Report of Polonia Restoration Co., Inc., 16 App. 5731; Report of the Department of General Services of the City of New York ("DGS"), 16 App. 5743. The Court relies on this evidence as well in concluding that OKA's estimates are neither persuasive or credible.

(a) The Mechanical System

Mr. Bronson Binger and a team from DGS were clearly the experts most qualified to pass upon the costs of renovating an older building since they make approximately one hundred such estimates every year. *See* 6 App. 2036. Even more significantly, Mr. Binger personally participated in the renovation of the Church of the Heavenly Rest, a building also designed by Goodhue, and was thus intimately familiar with St. Bartholomew's mechanical systems.[36] *See id.* at 1859–60.

In conducting his assessment, Binger assembled a team which included an electrical engineer, a heating ventilation and air conditioning engineer, a plumbing engineer, and a cost estimator experienced in each of those areas. *See id.* at 1858–59. Binger's team approached the problem by examining each piece of equipment individually, determining what the life expectancy of each piece was and what needed to be replaced, and then pricing out the work for each piece individually. *See id.* at 1863. Binger's conclusion was that although St. Bartholomew's has deteriorated, it is operable. *See id.* He also concluded that

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36. The Church protests that it cannot be expected to perform the miracles that Mr. Binger performed for the Church of the Heavenly Rest. Quite aside from the fact that Mr. Binger's achievements, although impressive, are not miraculous, Mr. Binger volunteered to assist the Church pro bono in carrying out the recommended repairs and rehabilitation. *See* 6 App. 2018; 16 App. 5751. Given the Church's claim of financial hardship, it is difficult to understand why it has not accepted this offer.

if the existing equipment is refurbished, much of it has an unlimited useful life; that the equipment that has deteriorated can generally be rebuilt for less than the cost of new equipment; and that much of the existing equipment can be made serviceable for relatively small amounts of money over a period of years. *See id.* at 1863–66.

Although Binger acknowledged that his estimate was preliminary, and that older mechanical systems do require knowledgeable maintenance personnel, the Court finds Mr. Binger's estimate to be the most credible and persuasive evidence presented to the Commission.

Binger also concluded that those items that had to be repaired immediately included repairs to the steam meter room, the condenser water system, the D.C. fan motors, the exhaust systems, the Organ, and the heating and plumbing systems at a total cost of $398,000. *See* 16 App. 5747–48. He estimated that further improvements to those and other systems should be undertaken over the next two to ten years at an additional cost of $400,000, and that further elective improvements could be undertaken if finances permitted at a cost of $632,000. *See id.* In all, Binger's estimates that the church and community house mechanical systems could be put into excellent shape for $1,430,000. *See id.*

(b) The Exterior Work

Other than the OKA report, the only other evidence of the cost of exterior repairs submitted to the Commission was the report of the Polonia Restoration Co., Inc., a corporation specializing in exterior renovation. *See* 16 App. 5731. Although Polonia's methodology was not detailed in the fashion of Binger's methodology, it appears that Polonia considered repair as an alternative to replacement, and provided cost estimates based on the actual work to be done rather than on a square foot basis. *See* 16 App. 5731–38. The Court concludes, therefore, that Polonia's estimate is the most credible and reasonable assessment of the work required on the exterior of the building.

While Polonia agreed that most of the exterior areas addressed by the OKA report needed attention, Polonia differed as to the extent of the work necessary, whether there should be repair rather than replacement, and differed substantially as to cost. Polonia concluded that it would be appropriate to carry out exterior repairs over five years, and that essential repairs could be accomplished at a cost of $1,141,903 with further optional repairs costing $514,000, for a total cost of 1,655,903. *See id.* at 5734.

Thus, if the Binger estimate for interior work of $1,430,000 is added to Polonia's estimate of $1,655,903 the total cost of renovation for both buildings is approximately $3,085,903 phased in over a period of several years. This estimate is, of course, drastically lower than the OKA estimate. The Church contends, however, that it cannot afford to expend even three million dollars on repairs and replacement.

4. *The Church's Financial Condition*

Plaintiff contends that even if it could put the church and the community house in good working order for $3 million, its financial circumstances do not permit it to expend that amount of money while it continues to run its other programs. The Court rejects this contention as unsupported by the evidence produced before the Commission.

There is little disagreement in the record over the size of the Church's endowment. Although subject to fluctuations in the stock market, the market value of the Church's portfolio stood in excess of $12.5 million at the end of 1985.[37] *See* 16 App. 5487, 5646. Its total funding for 1984 was $14,355,000,

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37. In addition to its endowment assets, the Church owns a twelve room cooperative apartment at 860 Park Avenue which it uses as a residence for its minister, Reverend Thomas Bowers. Although that asset is carried on the books at $104,000, estimates of its market value range much higher. *See* 12 App. 4378.

including other operating revenues. *See* 2 App. 598. While this sizeable endowment would appear on its face to be capable of supporting a capital expenditure of $3 million, plaintiff contends that much of that endowment cannot be expended under New York law, and much of the rest of the endowment is restricted for specific purposes.[38]

Although this contention may be true in a general sense, plaintiff has failed to recognize that some of the restrictions permit the use of these funds to support of the church building and the community house. These funds could therefore be used for necessary capital expenditures. Moreover, these funds if used for this purpose could free up unrestricted funds that have been designated by the vestry for the same purpose.

One witness before the Commission estimated that as much as $6 million of the endowment could be used for capital expenditure purposes. *See* 6 App. 1971. Of that $6 million, $2.9 million is expendable for specific purposes, and $3.1 million at the discretion of the vestry. *See id.* Plaintiff's own accountants reported that of the Church's $12 million endowment, $2.7 million was expendable for designated purposes, $4.5 million was unrestricted and $4.8 million was restricted as to principal. *See* 13 App. 4569; *see also* 4526–27. Thus, the Court finds plaintiff's claim that because parts of the endowment are restricted it cannot use some of them for capital projects to be incredible and unsupported by the evidence.

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38. The endowment is restricted by law in two ways. First, New York law prohibits expenditure of those parts of the endowment restricted by the donor unless the donor consents or the not–for–profit corporation obtains a judicial release. *See* N.Y. Not–for–Profit Corp. Law § 522 (McKinney Supp. 1989). Second, New York law restricts expenditure of those parts of the endowment designated by the donor for specific purposes to expenditure for those purposes. *See id.* New York law leaves the spending of unrestricted funds, such as the net realized gains on an endowment, to the sound discretion of the vestry. *See id.* In addition, some of the endowment has been designated by the vestry for specific purposes. However, the vestry is permitted to redesignate that money at any time.

The Church also contends that if it takes $3 million out of its endowment, it will be unable to operate its other programs due to loss of income from the endowment. While it is true that income from the endowment makes up a significant portion of the Church's $3 million annual operating revenue, *see* 15 App. 5392, that claim is unpersuasive for the following reasons.

First, the Church does not have to remove $3 million from the endowment all at once. The endowment could be depleted gradually over a period of years as the work on the church and the community house is performed.[39] Gradual depletion would not only lessen operating revenue lost due to lower dividend and interest income, but would also allow capital appreciation to offset the yearly withdrawals. Second, the Church has, over the last ten years operated at close to a break even level, showing surpluses in some years and losses in others. *See* 2 App. 510; 10 App. 3484–87.[40]

Moreover, it has done so while spending more than $1.6 million on expenses related to the development of the office tower. *See* 13 App. 4655; 16 App. 5637. These facts not only show that the Church is able to make use of large amounts of endowment income for discretionary spending, but also constrain the Court to reject plaintiff's contention that it has been forced to make drastic cutbacks in operating expenses because

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39. Both the Binger and Polonia estimates sensibly provided that work should be phased in over several years with the most urgently needed repairs taking precedence. This is the normal practice for undertaking major renovation work, primarily for financial reasons. *See* 3 App. 906–07; 16 App. 5747. In addition, the Church never established that it could not borrow a lump sum against its endowment and amortize the loan over an even longer period. *See* 5 App. 1777.

40. This is true in spite of the fact that the Church budget does not distinguish between operating and capital expenditures, *see* 16 App. 5673, and thus some of the amount reflected as operating expenses may in fact be capital expenditures.

current revenues from endowment income are insufficient to fund the Church's programs.

Finally, the Church has presented no evidence to show what effect withdrawals from the endowment would have on its operating budget. In fact, it did not provide the Commission with any financial projections that would enable this Court to determine its future financial prospects. This failure is fatal to plaintiff's claim of prospective financial hardship.

Not only has the Church failed to provide such financial projections, it has failed to consider either the possibility of a capital fund raising project or the possible sale of the Church's air rights to a nearby building. Plaintiff's own expert testified that he thought a successful fund raising drive could raise as much as $2 million over a period of years. *See* 2 App. 517–18; 11 App. 3741–42. Although plaintiff vaguely asserts that such a campaign met with failure in 1980, plaintiff has failed to submit any proof to support this contention, and has, as noted above, submitted proof through its own expert supporting a contradictory inference. The Court finds, therefore, that fund raising is at least a reasonable alternative that must be explored before plaintiff's claim of financial hardship can be accepted as credible.[41]

Similarly, plaintiff denies that there is any possibility of selling its air rights to raise revenue.[42] Plaintiff relies primarily on the assertion that it has not had any offers to buy those rights. In fact, interest in purchasing those rights was expressed in a written submission to the Commission. *See* 16 App. 5727.

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41. The reasonableness of this alternative is amply illustrated by the experiences of other churches and synagogues that have conducted successful capital fund raising campaigns. *See* 17 App. 5846–76.

42. Air rights refer to the right to develop buildings surrounding the Church property in a way that would intrude upon the air space which is otherwise part of the Church's property interest. The value of those rights has been estimated at over $55 million. *See* 11 App. 4114.

It also appears that interest in the development rights was expressed in the past, but was not pursued by the Church. *See id.* at 5678, 5582–85. Thus, the Court finds that sale of the Church's air rights presents a reasonable method of alternative fund raising that must be explored before a claim of financial hardship can be supported.[43]

In sum, the Court finds that the Church has failed to show that it cannot afford to pay for the cost of necessary repairs to the church and the community house. It follows that plaintiff has failed to show that its financial situation precludes it from restoring its property and carrying out its religious mission and charitable purpose. Therefore the Court finds, as a matter of fact, that the Church has failed to prove that its community house is inadequate for the purposes to which it is devoted, that the Church has failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities do require some repair and rehabilitation, the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation.

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43. Plaintiff also contends that it is not reasonable to expend $3 million on improvement of its property in light of the low market value of the property. The Court rejects this argument. In support of this argument plaintiff submitted the testimony and report of Brown, Harris, Stevens, Inc. *See* 2 App. 525, 4 App. 1247, 11 App. 4059, 15 App. 5287. However, Brown, Harris, Stevens estimated that after necessary repairs the community house would have a market value, as landmarked, of approximately $15 million, and that the church would have a market value, as landmarked, of $20 million, for a total landmarked value of $35 million. *See* 11 App. 4063. The Court finds that $3 million is a wholly reasonable sum for repairs in light of plaintiff's own estimated value of the properties, an estimate which the Committee to Oppose corroborated. *See* 3 App. 826.

CONCLUSION

Since plaintiff has failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities, plaintiff's First and Fifth Amendment claims must be rejected. The clerk is directed to enter judgment for the defendants and close the above-captioned action.

It is SO ORDERED.

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Fourteenth Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

THE ADMINISTRATIVE CODE AND CHARTER OF THE CITY OF NEW YORK

Title 25

Land Use

* * *

CHAPTER 3

Landmarks Preservation and Historic Districts

§ 25–301 Purpose and declaration of public policy.

a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's

cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 25-302 Definitions. As used in this chapter, the following terms shall mean and include:

a. "Alteration." Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest." Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return." Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project." Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or other mode of financial assistance, exercise of the city's powers of eminent domain, contribution of city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission." The landmarks preservation commission.

f. "Day." Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 25-317 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes, provided however, that the term "improvement parcel" shall also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter.

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement, including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 25–319 of this chapter, the surfacing, resurfacing, painting, renovating, restoring or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance

and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement;

for which a permit issued by the department of buildings is not required by law, where the purpose and effect of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled, upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 25–309 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the requests for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty–eight, and the time of the filing of such request, as a result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25–309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character of special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

§ 25–303 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts. a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate and, as herein provided in subdivision j, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to a list of scenic landmarks, located on property owned by the city, which are identified by a description setting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and, in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 25–318. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision.

e. Subject to the provisions of subdivisions g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the department of health.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to the board of estimate a report with respect to the relation of such designation or amendment thereof to the zoning resolution, projected public improvements and any plans for the

development, growth, improvement or renewal of the area involved.

(2) The board of estimate may modify or disapprove such designation or amendment thereof within ninety days after a copy thereof is filed with the secretary of the board provided that the planning commission has submitted the report required by this subdivision or that thirty days have elapsed since the referral of the designation or amendment to the commission by the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to the board of estimate a report with respect to the relation of such proposed rescission to the zoning resolution, projected public improvements and any plans for the development, growth, improvement, or renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the resolution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed

rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to subdivision a shall be made pursuant to notices of public hearings given, as provided in section 25–313.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic district or any amendment of any such designation or rescission thereof, the commission shall cause to be recorded in the office of the register of the city of New York in the county of which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the county of Richmond in the office of the clerk of said county of Richmond, a notice of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers, and its tax map, block and lot number or numbers, and in the case of all other counties, by its land map block and lot number or numbers.

§ 25–304 Scope of commission's powers. a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 25–305 Regulation of construction, reconstruction, alterations and demolition. a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district or any part of an improvement containing an interior landmark to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision a of section 25–318 of this chapter, or to any city–aided project, or in cases subject to the provisions of section 25–312 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 25–318 of this chapter and except in the case of a city–aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The applicant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application or amended application, every such applicant shall file with the commission a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

§ 25-306 Determination of request for certificate of no effect on protected architectural features. a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done; and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten–day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

§ 25–307 Factors governing issuance of certificate of appropriateness. a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 25–306 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 25–309 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 25–304 of this chapter, and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 25–304 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or reconstruction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features, together with such effects, and the exterior architectural features of the landmark, and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

§ 25–308 Procedure for determination of request for certificate of appropriateness. The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 25–309 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ 25–309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return. a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which include such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income–producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom;

the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 25–307 of this chapter, shall, within ninety days after the filing of the request for such certificate of appropriateness, make a preliminary determination of insufficient return.

(3) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or section four hundred fifty–eight, four hundred sixty or four hundred seventy–nine of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to section four hundred twenty–a, four hundred twenty–two, four hundred twenty–four, four hundred twenty–five, four hundred twenty–six, four hundred twenty–seven, four hundred twenty–eight, four hundred thirty, four hundred thirty–two, four hundred thirty–four, four hundred thirty–six, four hundred thirty–eight, four hundred forty, four hundred forty–two, four hundred forty–four, four hundred fifty, four hundred fifty–two, four hundred sixty–two, four hundred sixty–four, four hundred sixty–eight, four hundred seventy, four hundred seventy–two or four hundred seventy–four of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) The owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) The improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) Such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes; and

(d) The prospective purchaser or tenant:

(1) In the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) In the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1)

preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each such succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with

such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefitted by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejection filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c, and d of this section within the period of time prescribed by such subdivision d; or

(b) The commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) A plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) Give notice, pursuant to section three hundred eighty–two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) Enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a purchaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one hundred eighty day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one hundred eighty day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and

forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona–fide assignee, successor, lessee or sub–lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ 25–310 Regulation of minor work. a. (1) Except as otherwise provided in section 25–312 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work.

(2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to

the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) Whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; and

(b) If such work would have such effect, whether judged by the standards set forth in subdivisions b, c, d and e of section 25–307 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision c in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 25–306 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 25–318 of this chapter and to any city–aided project.

§ 25–311 Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 25–312 Remedying of dangerous conditions. a. In any case where the department of buildings, the fire department or the department of health, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it

unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance or issuance of any such order or direction.

§ 25-313 Public hearings; conferences. a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof or the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or her or their last known address or addresses, as the same appear in the records of the office of the commissioner of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notices shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 25–306 and 25–310 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or on any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the commissioner of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 25–314 Extension of time for action by commission. Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor

work, the applicant may extend such period of time by his or her written consent filed with the commission.

§ 25–315 Determinations of the commission; notice thereof. a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination, and of any preliminary determination of insufficient return made pursuant to paragraph one of subdivision a of section 25–309 of this chapter, to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 25–304 of this chapter, any determination of the commission granting a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivisions g and i of section 25–309 of this chapter.

§ 25–316 Transmission of certificates and applications to proper city agency. In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolution, the commission shall transmit such

certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ 25–317 Penalties for violations; enforcement. a. Any person who violates any provision of subdivision a of section 25–305 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 25–310 of this chapter or any provision of section 25–311 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty–five dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, willfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 25–305 of this chapter or paragraph two of subdivision a of section 25–310 of this chapter or any violation of the provisions of section 25–311 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 25–318 Reports by commission on plans for proposed projects. a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark;

shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty–five days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a city–aided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the commission a report on such plans, proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency, and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within forty–five days after such referral.

c. Except as provided in subdivision d of section 25–303, where the commission so requests, plans for the construction, reconstruction, alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty–five days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to conform with applicable laws concerning regulation of lots, storm water disposal and water courses. The commissioner of parks and recreation may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

§ 25–319 Regulations. The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of section 25–304 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions of an historic district and may vary from area to area in their provisions;

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 25–309 of this chapter;

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 25–320 Investigations and reports. The commission may make such investigations and studies of matters relating to the protection, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks, scenic landmarks and buildings in historic districts as the commission may, from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 25–321 Applicability. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation, or amended or modified designation, pursuant to the provisions of section 25–303 of this chapter, first making the provisions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.